IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 101

CITY OF CHICAGO, *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees

No. 102

CITY OF CHICAGO, *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

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DOCKET ENTRIES
("Georgian train")

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITY OF CHICAGO, THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, VILLAGE OF MILFORD, CITY OF WATSEKA, CITY OF HOOPESTON, CITY OF DANVILLE, CITY OF TERRE HAUTE, CITY OF VINCENNES and MAURICE F. RADRIZZI,

Plaintiffs,

v.

No. 68 C 956

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,

Defendants.

LIST OF DOCUMENTS

Placita, January 8, 1969 Session

DATE 1968	PROCEEDINGS
5/27	Filed complaint and 7 copies with Appendix's 1 through 7 attached thereto.
5/27	Filed Designation
5/27	Filed Affidavit under Rule 29
5/27	Filed Plaintiff's Motion and Memorandum in support of motion for separate trials in the action with exhibits "A" and "B" attached thereto, and 3 copies.
5/27	Issued summons and 4 copies with 4 copies of complaint as to United States of America and Interstate Commerce Commission

5/27–Issued summons and one copy with one copy of complaint as to Chicago and Eastern Illinois Railroad Company. EOE

6/13–Filed summons returned served on Chicago & Eastern Ill. Railroad. $3.00 v

6/13–Filed summons returned served on U.S. and Interstate Commerce Com. $6.00 v

6/21–Filed appearance of attorneys for defendant Chicago & Eastern Illinois Railroad Co. and 2 affidavits re Rule 39. v

7/1–Filed Affidavit under Rule 39 by James H. Durkin, attorney for defendant Chicago and Eastern Illinois Railroad Company.

7/1–Filed Affidavit under Rule 39 by Patrick C. Muller, attorney for defendant, Chicago and Eastern Illinois Railroad Company.

7/1–Filed Affidavit under Rule 39 by Keith F. Bode, attorney for defendant, Chicago and Eastern Illinois Railroad Company.

7/1–Filed Affidavit under Rule 39 by David C. Roston, attorney for defendant, Chicago and Eastern Illinois Railroad Company. R

7/1–Filed Notice.

7/1–Filed motion of defendant Chicago and Eastern Illinois Railroad Co., to dismiss

7/1–Entered Order motion to dismiss complaint by defendant Chicago and Eastern Illinois Railroad Co., taken under advisement. Briefs: 15-10 & 5. Perry, J. Mailed notice 7/3/68

7/1–Filed motion for leave to intervene by National Association of Railroad Passengers

7/1–Filed motion for leave to intervene by Georgia Public Service Commission and Tennessee Public Service Commission

7/1–Filed plaintiffs' motion for summary judgment

7/1–Filed memorandum in support of motion for summary judgment in plaintiffs' favor

7/1–Filed petition for reconsideration before the Interstate Commerce Commission, Finance Docket No. 24725

7/1–Filed reply of Chicago & Eastern Illinois Railroad Company to petition for reconsideration, before the Interstate Commerce Commission, F.D. No. 24725. G

7/1–(1) Motion of National Association of Railroad Passengers for leave to intervene (2) motion of Georgia Public Service Commission and Tennessee Public Service Commission for leave to intervene (3) motion for summary judgment, all taken under advisement: briefs instanter 15 & 10. Plaintiffs given 15 days to file additional motions with brief in support. Defendants to file answering brief 10 days thereafter and plaintiffs given 5 days thereafter to file their reply brief. Mailed notice 7/3/68. Perry, J. G

7/12–Filed Notice.

7/12–Filed Motion for extension of time.

7/12–Enter order motion for extension of time, parties to file brief by July 23, 1968; answering briefs July 31, 1968; reply briefs August 5, 1968, Perry, J. Mailed Notices 7/16/68. v

7/15–Filed Three-Judge Court Designation consisting of the following Judges: Honorable Elmer J. Schnackenberg, Honorable Edwin A. Robson, and Honorable Joseph Sam Perry. EOB

7/23–Filed memorandum of Chicago & Eastern Illinois Railroad Company in support of its motion to dismiss the complaint or in the alternative to strike certain allegations of the complaint

7/23–Filed proof of service. G

7/26–Filed motion of Alabama Public Service Commission and city of Evansville for leave to intervene and com-

plaint of intervening plaintiffs Alabama Public Service Commission and city of Evansville (Indiana) (3 copies). G

7/26–Filed supplemental memorandum in support of plaintiffs' motion for separate trials and for summary judgment (3 copies). G

7/31–Filed plaintiffs' answering memorandum in opposition to C&EI's motion to dismiss plaintiffs' complaint (3 copies). G

8/1–Filed joint memorandum of the United States of America and the Interstate Commerce Commission. G

7/29–Filed joint answer of the United States of America and the Interstate Commerce Commission. G

8/2–Filed notice and defendant Chicago and Eastern Illinois Railroad Company's motion to file memorandum

8/2–Filed memorandum of Chicago and Eastern Illinois Railroad Company in opposition to plaintiffs' motion for summary judgment and in support of the motion to strike paragraphs VII(B)(2) through VII(B)(10)

8/2–Filed proof of service.

8/2–Filed affidavit of John T. Warren (3 copies of all documents). G

8/2–Leave to file instanter memorandum in opposition to plaintiffs' motion for summary judgment granted. Leave given to remaining parties to file brief on or before August 10, 1968. Perry, J. Mailed notice 8/5/68. G

8/6–Filed reply memorandum of Chicago & Eastern Illinois Railroad Company in support of its motion to dismiss the complaint or, in the alternative, to strike certain allegations of the complaint

8/6–Filed proof of service (3 copies). G

8/7–Filed plaintiffs' reply memorandum on motion for summary judgment (3 copies).

8/7–Filed defendants notice of filing objections to motion to consolidate and Objections of Chicago & Eastern Illinois

Railroad Company to the motion to consolidate case No. 68 C 1666 with 68 C 956. (4 cys.) To Judges

9/11--Filed Exhibits by Gordon P. MacDougall. v

7/1–Filed amended designation of Three Judge District Court, due to death of Circuit Judge Elmer J. Schnackenberg, designating Hon. Win G. Knoch, Senior United States Circuit Judge, Hon. Edwin A. Robson, United States District Judge and Hon. Joseph Sam Perry, United States District Judge

10/4–Filed Motion of Indiana Public Service Commission and City of Henderson for Leave to Intervene and 3 copies. G

10/4–ORDERED cause set down for hearing at 10:30 A.M. on Monday, November 4, 1968. Perry, J. Mld. Notices 10-8-68. EOB

10/31–Filed Affidavit of J. B. Bonebrake and 3 copies. EOB

11/1–Filed Motion of Kentucky Railroad Commission and Mississippi Public Service Commission for leave to Intervene, and 3 copies. EOB

11/4–Hearing: held and cause taken under advisement, Knoch, J., Perry, J. and Robson, J. Mailed Notices 11/5/68

11/4–Order motion of defendant Chicago and Eastern Illinois motion to dismiss granted and cause hereby is dismissed. Knoch, Perry & Robson, J. Mailed notice 1/9/69. (Draft) JS6 G

1969

3/6–Filed plaintiffs' notice of appeal to the Supreme Court of the United States. $5.00p

4/9–Filed ICC transcript No. 24725 (under separate certificate)

4/9–Enter Order Motion to deliver up ICC transcript, docket No. 24725 to United States Supreme Court, granted. Perry, J. Mld. Notices 4-10-69. EOB

DOCKET ENTRIES
("Hummingbird" train)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TENNESSEE PUBLIC SERVICE COMMISSION, CITY OF CHICAGO, THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, STATE OF LOUISIANA, ALABAMA PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSION OF OHIO, RAILWAY LABOR EXECUTIVES' ASSOCIATION and UNITED TRANSPORT SERVICE EMPLOYEES (AFL-CIO),

Plaintiffs,

v. No. 68 C 1666

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

Defendants.

DATE 1968	PROCEEDINGS
9/6	Filed complaint and 5 copies. JS5 $15.00
9/6	Filed designation
9/6	Filed motion for temporary restraining order and memorandum in support of temporary restraining order and 3 copies
9/6	Filed motion for consolidation and 3 copies
9/9	Issued summons and 5 copies with 5 copies of complaint

9/6–Enter Temporary Restraining Order. (Draft) Order motion for temporary injunction and motion for consolidation with 68 C 956, City of Chicago, et al. v. United States of America, et al., entered and set for hearing before Judge Perry on September 12, 1968 at 10:15 a.m. Robson, J.

9/12–Filed appearance of Louisville and Nashville Railroad Company as defendant and that of their attorneys

9/12–Filed affidavit re general rule 39

9/12–Filed answer of Louisville and Nashville Railroad Company, defendant

9/12–Filed motion to dissolve the restraining order, or, in the alternative to require plaintiffs to post adequate bond

9/12–Filed motion of Louisville and Nashville Railroad Company, defendant, to dismiss the complaint

9/12–Filed memorandum in opposition to the motion for consolidation

9/12–Filed memorandum in opposition to motion for preliminary injunction (3 copies of documents listed above) G

9/12–Filed memorandum in support of temporary injunction or continuance of temporary restraining order

9/12–Filed amended complaint

9/12–Evidence heard and arguments concluded. Order alternative motion of defendant Louisville and Nashville Railroad Company to dissolve restraining order or to require plaintiffs post bond denied. Motion of plaintiffs for extension of temporary restraining order entered September 6, 1968, granted and said order to remain in effect until further order of Court. Motion Louisville and Nashville Railroad Company to dismiss complaint and motion of plaintiffs for consolidation of this proceeding with cause 68 C 956 are taken under advisement. Order plaintiffs given 6 days to file an answer to defendants brief this day filed and defendants are given 6 days to file reply thereto.

Cause continued under advisement under Rule 13. (Draft) Mailed notice 9/17/68. Perry, J. G

9/18–Filed plaintiffs' answering memorandum. G

9/25–Filed designation of Three Judge Court, Hon. Win G. Knoch, Senior United States Circuit Judge, Hon. Edwin A. Robson, United States District Judge and Hon. Joseph Sam Perry, United States District Judge. G

9/25–Filed summons returned served as to United States. $3.00

9/25–Filed summons returned served as to Louisville and Nashville RR Co. $3.00

9/25–Filed Marshal's return on service of summons and complaint served as to Interstate Commerce Commission. $4.00 G

9/26–Filed Memorandum of Louisville and Nashville Railroad Co. in response to plaintiffs' answering Memorandum. v

10/3–Filed Statement of Position of the United States of America and the Interstate Commerce Commission. C.

10/4–ORDERED cause set down for hearing at 10:30 A.M. on Monday, November 4, 1968. Perry, J. Mld. Notices 10-8-68. EOB

10/7–Filed Statement of Position of the United States of America and the Interstate Commerce Commission. EOB

10/10–Filed plaintiffs' Motion for Leave to file Supplemental Memorandum, Affidavit of Gordon P. MacDougall and Supplemental Memorandum on Venue. C

10/22–Filed Amended Answer of Louisville and Nashville Railraod Company, defendant, and 3 copies. EOB

11/1–Filed Motion of Kentucky Railroad Commission and Mississippi Public Service Commission for leave to intervene, and 3 copies. EOB

11/4–Filed Joint Answer of the United States of America and the Interstate Commerce Commission. EOB

11/4–Hearing held and cause taken under advisement, Knoch, J., Perry, J. and Robson, J. Mailed Notices 11/5/68

1/6–Filed Letter to Judges from Attorneys for Louisville & Nashville Railroad Co. with copy of order from I.C.C. dated Nov. 4, 1968. P

1/6–Filed Summary Memorandum of Louisville and Nashville Railroad Co. P

1/8–Order motion of Louisville and Nashville Railroad Company to dismiss granted and cause dismissed. Further ordered that temporary restraining order heretofore entered is hereby dissolved. (Draft) Mailed notice 1/9/69. Knoch, Perry & Robson. JS6 G

1/9–Motion for stay of court order of 1/8/69 dissolving temporary restraining order in entitled cause, Order the court entertains this motion and has been informed that Judge Robson is in Washington, D.C. on a multiple litigation hearing, and the court has also been informed that Judge Knoch is also not available; therefore, as one of the three Judges, the motion is denied for want of jurisdiction of one of the three Judges to stay the execution of a three judge court order. Mailed notice 1/10/69. Perry, J. G

3/6–Filed plaintiffs' notice of appeal to the Supreme Court of the United States. $5.00 pd

4/9–Filed ICC transcript No. 25047 (under separate certificate)

4/9–Enter Order Motion to deliver up ICC transcript Docket No. 25047 to United States Supreme Court, granted. Perry, J. Mld. Notices 4-10-69. EOB

A true copy attest
Elbert A. Wagner, Jr., Clerk

By: /s/ McClendon Grice
Deputy Clerk, U.S. District Court
Northern District of Illinois

Date: April 25, 1969

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 68 C 956

CITY OF CHICAGO, THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, VILLAGE OF MILFORD, CITY OF WATSEKA, CITY OF HOOPESTON, CITY OF DANVILLE, CITY OF TERRE HAUTE, CITY OF VINCENNES and MAURICE F. RADRIZZI, *Plaintiffs*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, *Defendants*.

Memorandum and Order

Before Knoch, Senior Circuit Judge, and Robson and Perry, District Judges.

Robson, District Judge:

This is a suit to review certain findings and conclusions of the Interstate Commerce Commission. The defendant railroad has moved to dismiss. This court is of the opinion that the motion should be granted.

On August 31, 1967, the Chicago & Eastern Illinois Railroad Company ("Eastern") gave notice under 49 U.S.C. § 13a(1) that, effective October 1, 1967, its trains numbered 93 and 54 between Chicago, Illinois, and Evansville, Indiana, would be discontinued. On September 18, 1967, the Interstate Commerce Commission ("Commission") entered an order requiring Eastern to continue operating trains 93 and 54 pending an investigation by the Commission. After hearings and briefs, Division 3 of the Commission on January 25, 1968 (served January 31, 1968),

decided to terminate its investigation, and filed a report outlining its reasons. A petition for reconsideration was denied on May 8, 1968. This suit was filed shortly thereafter. A three-judge court was convened and a joint hearing (with *Tennessee Public Service Comm.* v. *United States*, 68 C 1666) was held on November 4, 1968.

The statute under which Eastern posted its notices to discontinuance is a unique statute passed in 1958 to deal with serious financial problems faced by this nation's railroads. It allows the railroads to discontinue certain interstate trains without seeking prior approval of the Interstate Commerce Commission or any state commissions. If the Commission does nothing to stop the railroad, the discontinuance follows automatically by statute, with no need whatsoever for a Commission order to authorize the discontinuance. 49 U.S.C. § 13a(1). The Commission has a short period (30 days) in which to decide whether an investigation is necessary, and, after an investigation (if, of course, the Commission determines it is necessary), the Commission may order the continuance of part or all of the trains involved. This period of continuance is restricted to only one year, after which time the railroad may post further notices and go through the entire process again.

It has been conceded by both sides that when the Commission decides not to enter into an investigation, there is no judicial review, even though there may be cities and states which might be "aggrieved" by the discontinuances. *State of New Jersey* v. *United States*, 168 F.Supp. 324 (D. N.J. 1958), *affirmed per curiam* 359 U.S. 27 (1959); *Sludden* v. *United States*, 211 F. Supp. 150 (M.D.Pa. 1962). In the *New Jersey* case, *supra*, at 329, the court said that the Commission's order foreclosing an investigation was

> "nothing other than an announcement that the Commission intended to take no action with respect to the railroad's notice of intention to discontinue the ferries. Section 13a(1) clearly leaves to the absolute discretion of the Commission the determination of whether or not

> it . . . shall make any investigation of the matter or avail itself of its temporary veto power by way of suspension within the limitations of the Act."

The instant case, contend the plaintiffs, has a crucially different element: The Commission here entered into an investigation, held hearings, made findings, and issued an order terminating the investigation. Even though the plaintiffs concede, as they must, that the statute [§ 13a(1)] was the source for the authority to discontinue, and not any order or action of the Commission, they argue that judicial review exists as to the order terminating the investigation under 28 U.S.C. § 1336, which provides for review of Commission "orders". The question whether such a Commission order does fall under § 1336 has been discussed at length in several prior decisions.

In *State of Minnesota* v. *United States,* 238 F.Supp. 107, 112 (D.Minn. 1965), the Court determined that the report and findings filed after the investigation was terminated were both "gratuitous" acts. The reasoning behind the Commission's decision to terminate, the court continued, even though it showed that the Commission "decided" that the discontinuances were proper, is part of the power to terminate and within the "sole discretion" of the Commission, and not subject to judicial review. The court reasoned that the primary purpose of an investigation and the hearings was to give the Commission enough information so that it would be able to reach a sound judgment as to whether it should interfere with the proposed cutbacks in rail service. Two situations were posed: (1) Where the Commission knows enough about the situation, as in the *New Jersey* case, *supra,* at 328, it will hold no investigation, and the discontinuance will occur automatically; and (2) Where the Commission does not know enough about the problem, it will investigate, hold hearings, determine (as in this case) that the discontinuance does not warrant its interference, terminate the investigation, and the discontinuance will *still* occur automatically. There is, said the

court, no logical difference between the two situations. Where the Commission decided to take action, the order requiring continuance for one year would be reviewable; however, the "mere decision of the Commission to take no action is not". *Minnesota, supra,* at 112. To provide review of decisions to terminate investigations, concluded the court, would not only be contrary to the clear meaning of § 13a(1), but would be poor policy, "since it might even encourage the Commission not to investigate doubtful cases." *Id.,* at 113.

The court in *State of New Hampshire* v. *Boston and Maine Corp.,* 251 F.Supp. 421 (D.N.H. 1965), recognized that there might be some unfairness here. However, it said that Congress, in meeting what was almost a crisis situation, could provide review for one side (the railroads), especially where the other side would be seeking review of Commission "non-action", if there were cogent policy considerations to call for such a result. *Id.,* at 425. It is entirely within the spirit of the legislation to have given the railroads rapid relief without lengthy review. In fact, it was the delay inherent in the proceedings before the state commissions that called forth the passage of Section 13a(1). See the discussion of the legislative history in, e.g., *State of Vermont* v. *Boston and Maine Corp.,* 269 F.Supp. 80, 84 (D. Vt. 1967).

These considerations sufficiently meet, in this court's opinion, the contention by two later courts that Congress did not intend to deny judicial review in the present circumstances. *Vermont, supra; City of Williamsport* v. *United States,* 273 F.Supp. 899, 902-903 (M.D.Pa. 1967).*

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*The same underlying facts were the substance of the case of *City of Williamsport* v. *United States,* 282 F. Supp. 46 (M.D. Pa. 1968), affirmed *per curiam* 392 U.S. 642 (1968). This case decided that the Commission has the power to order a partial continuance of operations, but did not discuss the jurisdictional question at all. There was also no discussion of the jurisdictional issue in *People of the State of California* v. *United States,* 258 F. Supp. 950 (N.D. Cal. 1966).

Further supporting this conclusion is the fact that in Section 13a(2), which deals with wholly intrastate operations, Commission approval is expressly necessary before a railroad can discontinue any service. 49 U.S.C. § 13a(2). The provisions, therefore, in 28 U.S.C. § 1336, that only Commission "orders" are reviewable, call for judicial review in cases falling under Section 13a(2). But where, as in Section 13a(1), the statute is self-implementing, no comparable "order" of the Commission is involved. Taking the statute in its entirety, it seems apparent that Congress intended to deny judicial review in the instant case.**

** The Commission takes the position that review is proper under the present statute but has requested an amendment to the Act to remove any doubt. *Vermont, supra,* at 83-84, n. 2.

This court, in view of its opinion on the jurisdictional issues, does not pass on the other questions presented.

It is therefore ordered that the defendant Chicago & Eastern Illinois' motion to dismiss be, and it is hereby granted and the cause is hereby dismissed.

WIN G. KNOCH
Circuit Judge

J. SAM PERRY
District Judge

EDWIN A. ROBSON
District Judge

January 8, 1969.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 68 C 1666

TENNESSEE PUBLIC SERVICE COMMISSION, CITY OF CHICAGO, THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, STATE OF LOUISIANA, ALABAMA PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSION OF OHIO, RAILWAY LABOR EXECUTIVES' ASSOCIATION AND UNITED TRANSPORT SERVICE EMPLOYEES (AFL-CIO), *Plaintiffs*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Defendants*.

Memorandum and Order on Motion to Dismiss

Before Knoch, Senior Circuit Judge, and Robson and Perry, District Judges.

Robson, District Judge:

This is a suit to review certain findings and conclusions of the Interstate Commerce Commission. The defendant railroad has moved to dismiss. This court is of the opinion that the motion should be granted.

On April 3, 1968, the Louisville & Nashville Railroad Company ("L & N") gave notice under 49 U.S.C. § 13a(1) that, effective May 7, 1968, its trains numbered 6 and 7 between Cincinnati, Ohio, and New Orleans, Louisiana, would be discontinued. The Interstate Commerce Commission ("Commission"), on April 24, 1968, entered an order requiring the L & N to continue operating trains 6 and 7

pending an investigation by the Commission. After hearings, the Commission terminated its investigation, and on September 3, 1968 (served September 6, 1968) filed a report. This action was filed shortly thereafter, and, on September 9, 1968, a temporary restraining order was entered. After a further hearing, the restraining order was continued until a three-judge court could be convened and a decision rendered. A joint hearing (with *City of Chicago* v. *United States*, 68 C 956) was held on November 4, 1968. The Commission denied a petition for reconsideration on October 31, 1968, thereby making its action administratively final.

The defendant L & N has moved to dismiss on the ground that this court lacks jurisdiction to review the Commission's decision to terminate the investigation of the proposed discontinuance. This issue was discussed at length in the opinion filed today in *City of Chicago* v. *United States*, 68 C 956. A copy of that opinion is attached and the argument on the jurisdictional issue is hereby incorporated by reference. In short, this court is of the opinion that Congress intended to deny judicial review in cases such as the one before this court.

It is therefore ordered that the defendant Louisville and Nashville Railroad Company's motion to dismiss be and it is hereby granted, and the cause is hereby dismissed.

It is further ordered that the temporary restraining order heretofore entered be and it is hereby dissolved.

WIN G. KNOCH
Circuit Judge

J. SAM PERRY
District Judge

EDWIN A. ROBSON
District Judge

January 8, 1969

ORDER

SERVICE DATE
SEPTEMBER 20, 1967

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D.C., on the 18th day of September A.D. 1967.

Finance Docket No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.
DISCONTINUANCE OF TRAINS NOS. 93 AND 54
BETWEEN CHICAGO, ILL., AND EVANSVILLE, IND.

It appearing, That on August 31, 1967, the Chicago & Eastern Illinois Railroad Co. filed with this Commission notices under section 13a(1) of the Interstate Commerce Act, as amended, that effective October 1, 1967, said carrier will discontinue service of its passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind.;

It further appearing, That complaints by certain individuals, associations, communities, and by railway employees have been received requesting suspension of the proposed discontinuance pending investigation to determine the extent of public need for the trains in question;

It further appearing, That discontinuance of the said train service by the Chicago & Eastern Illinois Railroad Co. may not be warranted by the public convenience and necessity, and that operation of such service may not unduly burden interstate commerce;

It further appearing, That the due and timely execution of this Commission's functions in this proceeding imperatively and unavoidably requires the omission of an examiner's recommended decision herein, for the reason that under the provisions of section 13a(1) of the Interstate Commerce Act, the said train service may be discontinued unless a decision herein is made before expiration of the four-month period hereinafter provided for;

It is ordered, That an investigation of the proposed discontinuance of train service described hereinabove, be, and it is hereby, instituted under the provisions of section 13a(1) of the Interstate Commerce Act, and that the matter be assigned for hearing at a time and place hereafter to be fixed;

It is further ordered, That the train service described hereinabove be continued pending hearing and decision in said investigation, but not for a longer period than four months beyond the date when the discontinuance otherwise would have become effective unless otherwise ordered herein; and

It is further ordered, That a recommended decision by the examiner to whom the investigation is assigned for hearing be omitted as part of the decision-making process in this proceeding, and the record herein shall be considered as certified to the Commission, Division 3, for initial decision when received by the Secretary of the Commission for filing in the docket.

By the Commission, Division 3.

/s/ H. Neil Garson
Secretary.

(SEAL)

Served January 31, 1968

F-9449

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—Discontinuance of Trains Nos. 93 and 54 Between Chicago, Ill., and Evansville, Ind.

Decided January 25, 1968.

Upon investigation, found that operation by the Chicago & Eastern Illinois Railroad Company of passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., is not required by public convenience and necessity, and that the continued operation thereof will unduly burden interstate commerce. Investigation discontinued.

James H. Durkin and *Edwin Richardson* for rail carrier.

J. Fred Parker for Georgia Public Service Commission, protestant.

William H. Wilson for Public Service Commission of Indiana, protestant.

Mary Louise Wolford for the public of the State of Indiana, protestant.

Edward G. Finnegan, Leon J. Heidgen and *James A. Parker* for Illinois Commerce Commission, protestant.

Harold Cowen and *Bernard Rane* for city of Chicago, Ill., protestant.

Robert S. Matthews and *Ronald Warrum* for city of Evansville, Ind., protestant.

Keith E. Roberts for village of Milford, Ill., and city of Watseka, protestants.

William E. Nelson for city of Hoopeston, Ill., protestant.

Marion E. Wright for city of Danville, Ill., protestant.

Robert F. Doolittle, Jr. for city of Vincennes, Ind., protestant.

Frederick T. Bauer for city of Terre Haute, Ind., protestant.

Raymond J. Kearns for Sisters of Providence, St. Mary of the Woods, Ind., protestant.

William P. Byroad, Gordon E. Cox, R. L. Dresbach, Thomas J. Duggan, George B. Lee, J. Thomas McNeal, William E. Nelson, Earl G. Quinn, Keith E. Roberts, J. H. Smith, and George P. Sheahan for various railway labor organizations.

Report of the Commission

Division 3, Commissioners Tuggle, Bush, and Stafford

TUGGLE, *Commissioner:*

Pursuant to the provisions of section 13a(1) of the Interstate Commerce Act as amended, the Chicago & Eastern Illinois Railroad Company (C&EI), a common carrier by railroad subject to the provisions of part I of the act, on August 31, 1967, filed notices and supporting statements in which it proposed to discontinue, effective October 1, 1967, service by its interstate passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., a distance of 287 miles. Copies of the notices were duly served and posted in the manner required by section 13a(1) and our rules and regulations thereunder.

By petition filed concurrently in Finance Docket No. 24726, C&EI seeks authority under section 13a(2) to discontinue service by its intrastate passenger trains Nos. 3 and 4 between Chicago and Danville, Ill. That proceeding is the subject of a report and recommended order[1] of the

[1] By petition filed December 14, 1967, C&EI sought omission of the examiner's report and recommended order in Finance Docket No. 24726 and consolidation of that matter with this proceeding. Replies thereto were filed by certain protestants, and by order entered January 8, 1968 the petition was denied.

hearing examiner served separately. C&EI's application filed with the Illinois Commerce Commission for authority to discontinue trains Nos. 3 and 4 was denied by that body on September 20, 1967. Appropriate notice of the petition filed here in Finance Docket No. 24726 was served on the Governor of the State of Illinois.

Protests to C&EI's proposal in the titled proceeding were filed by communities along the line and State, civic, business, and railway labor interests, as well as users of the trains. By order of September 18, 1967, we instituted an investigation and required continued operation of trains Nos. 93 and 54 pending a hearing and decision (up to the statutory maximum of 4 months). Because of the statutory limitation on the time available for investigation and decision, our order provided for omission in the titled proceeding of a report and recommended order by the examiner as part of the decisional process and for certification of the record to us for initial decision.

Public hearings were held in Chicago, Momence, Watseka, Hoopeston and Danville, Ill., and Evansville, Vincennes, and Terre Haute, Ind., on a consolidated record with the section 13a(2) proceeding in Finance Docket No. 24726. Briefs were filed by C&EI, the Illinois Commerce Commission, and jointly by the village of Milford, the cities of Watseka, Danville and Hoopeston, Ill., and the Brotherhood of Railroad Trainmen.

At the hearing protestants moved for dismissal of the proceedings on several grounds, principally that since Missouri Pacific Railroad Company (MoPac) controls C&EI, use of financial data relating only to C&EI and excluding MoPac is grossly misleading and contrary to the provisions of the act. Other relief sought included suspension or termination of the proceedings and oral argument on the motion. C&EI replied in opposition, and the motion was taken under advisement. The protestants pursue the argument on brief.

The motion is denied. Oral argument is not warranted. By contending MoPac is a necessary party to these proceedings, protestants ignore the plain language of section 13a of the act, which confers upon this Commission jurisdiction over proposed passenger train discontinuances by "a carrier or carriers subject to this chapter." Clearly, C&EI falls within the term "a carrier" subject to part I of the act. Whether or not the statutory standards for ordering a continuance of service are met is a matter which, in this case, does not depend (as will later be made clear) upon the corporate relationship of MoPac and C&EI. Piercing the corporate veil may be warranted in some situations, as for example, where false and misleading representations are made or where some unlawfulness may be involved, and perhaps in other circumstances, but here no such question is raised and no substantial reason is advanced to pursue that course. The record indicates that C&EI is the proper party in interest and that it has fully cooperated in presenting the data required for our action.

Trains Nos. 93 and 54 operate on the following schedules:

Train No. 93 daily	Miles	Stations	Train No. 54 daily
P.M.			A.M.
3:45	0.0	Lv. Chicago, Ill. .....Ar.	10:35
3:59	6.6	Chicago (63rd St.)	10:21
A4:30	28.8	Steger	E 9:44
....	77.5	Watseka	G 8:49
6:10	123.2	Danville	7:55
7:15	177.5	Terre Haute, Ind.	6:40
B7:45	203.7	Sullivan	G 6:11
8:18	234.7	Vincennes	5:40
D8:50	259.0	Princeton	5:05
9:55	287.2	Ar. Evansville .....Lv.	4:30

A—Stops to receive passengers.
B—Stops to discharge revenue passengers from Chicago and Steger.
D—Stops to discharge or receive revenue passengers.
E—Stops to discharge passengers.
G—Stops to receive revenue passengers for Chicago.

Their operation is in conjunction with trains of the Louisville & Nashville Railroad (L&N) similarly designated, which operate between Evansville and Atlanta, Ga., and Montgomery, Ala. The interchange is at Evansville. The L&N splits its southbound No. 93 at Nashville, Tenn., with one section terminating at Atlanta and the other at Montgomery. L&N originates one section of its northbound train No. 54 at Atlanta and the other at Montgomery, and consolidates the two at Nashville.

The trains, designated "The Georgia—Hummingbird," carry passengers and baggage. They are powered with three diesel locomotives, and have a consist of 10 regularly assigned cars daily with 11 cars on Friday, Saturday and Sunday. Train No. 93 leaves Chicago with a baggage-mail car, a dormitory, diner, lounge, sleeper and two coaches destined to Atlanta daily; a coach destined to Evansville on Friday, Saturday and Sunday; two coaches destined to Montgomery daily; and a sleeper destined to Mobile daily. Train No. 54 has a baggage-mail car, a dormitory, diner, lounge, sleeper and two coaches orignating at Atlanta daily; a coach originating at Evansville on Friday, Saturday and Sunday; two coaches originating at Montgomery daily; and a sleeper originating at Mobile daily; all cars having destination to Chicago. The passenger-carrying equipment is air-conditioned.

Due to a restructuring of mail service by the U. S. Post Office Department, the mail cars were discontinued as of June 10, 1967, except for one storage-mail car from Chicago to Birmingham, Ala., and in October 1967, the Post Office Department removed that car. The mail handled in the baggage-mail car is minimal. Train No. 93 still carries express traffic for the account of Railway Express Agency, Inc., destined to Chattanooga. These trains do not handle the express to or from C&EI points south of Chicago.

Alternate passenger transportation service to and from the communities served by C&EI between Chicago and

Evansville, and south thereof served by L&N is available by bus and by air at most points. There are four flights daily southbound and three northbound between Chicago and Danville; two flights daily southbound and three northbound between Chicago and Terre Haute; and four flights daily southbound and five northbound between Chicago and Evansville. Numerous flights are scheduled between Chicago, on the one hand, and, on the other, Atlanta, Chattanooga, Birmingham, Nashville, Montgomery, and Mobile, and between Evansville and Atlanta. Watseka and Hoopeston, Ill., Sullivan, Vincennes and Princeton, Ind., have no air service.

A major bus line operates three southbound and four northbound buses daily between Chicago and Evansville, with stops at all intermediate points served by the subject trains. Rail transportation is available, though limited, (a) by C&EI trains Nos. 3 and 4 between Chicago and Danville (but those are the trains involved in Finance Docket No. 24726, the discontinuance proceeding referred to above) and (b) by Illinois Central Railroad (IC) between Chicago and Carbondale, Ill., and points south thereof (four trains daily in each direction). Highway distances between communities served by C&EI and those served by IC in Illinois vary from 12 to 35 miles. Bus fares are lower than rail fares between Chicago and all points served by the subject trains, except Sullivan, Ind. Air fares are higher than rail or bus.

C&EI maintains that it has lost patronage to the private passenger automobile (as a mode of intercity transportation), and, as evidence thereof, introduced statistics showing the increase in the number of registered automobiles in the counties of Illinois and Indiana traversed by the subject trains. Considering the five Illinois counties (Cook, Will, Kankakee, Iroquois, and Vermillion) and the six Indiana counties (Park, Vigo, Sullivan, Knox, Gibson, and

Vanderburg) it was shown that in 1960 the Illinois counties had 1,653,520 registrations while the Indiana counties had 132,253, and that by 1966, there was an increase of about 20 percent—to 1,994,751 in the Illinois counties and 158,186 the Indiana counties.

For the benefit of automobile users, Illinois Highway 1 between Chicago and Danville and U. S. Highway 41 between Danville and Evansville are adjacent to and parallel the line of C&EI. Also U. S. Highway 41 continues northward in Indiana east of Illinois Highway 1 to Chicago. Both are first class highways and U. S. Highway 41 has substantial segments with four lanes. A number of witnesses testified to the effect that driving on the highways is dangerous. South of Chicago and its suburbs the roads traverse sparsely populated areas, are generally straight and the terrain is flat.

The population[2] at the points served by the subject trains was shown as follows: Chicago 3,550,404, Chicago Heights 41,000, Watseka 5,219, Hoopeston 6,606, Danville 41,856, Terre Haute 72,500, Sullivan 4,979, Vincennes 18,046, Princeton 7,906, and Evansville 141,543.

A number of those points have commercial or service areas extending beyond their corporate limits and the population reflected by such areas is larger than for the point involved.

During the periods 1965, 1966 and first 6 months of 1967, train No. 93 carried 84,259, 82,213 and 31,913 passengers, respectively, of which 53,344, 56,230, and 20,952 were delivered to L&N at Evansville. The daily average numbers of revenue passengers transported by that train for the same periods were 230,225, and 176, respectively, of which

[2] Based on the census taken in 1960. Since that time, some of the areas served have had population increases.

84, 71, and 60, respectively, were local passengers (traveling between C&EI stations). During the same periods, train No. 54 carried 76,854, 75,271, and 28,186 revenue passengers, respectively, of which 57,983, 60,063 and 21,682, were received from L&N at Evansville. The daily average numbers of revenue passengers transported by that train for the same periods were 210, 205, and 153, of which 51, 40, and 33, respectively, were local. The foregoing data were determined from analysis of records of tickets collected by conductors, cash fares received, and tickets honored but not collected, apportioned to the subject trains according to the number of miles traveled thereon.

The supporting studies also show the numbers of passengers boarding and deboarding at each station. Considering the last 6 months of 1967 as representing the present level of patronage, of the 176 passengers on train No. 93, an average of 156 boarded at Chicago, 12 at Steger, 5 at Danville, 2 at Terre Haute and 1 at Vincennes, and 17 left the train at Danville, 20 at Terre Haute, 1 at Sullivan, 7 at Vincennes, 2 at Princeton, 13 at Evansville, and 116 continued on the L&N. Of the 153 passengers on train No. 54 an average of 120 were through passengers from the L&N, 12 boarded at Evansville, 2 at Princeton, 6 at Vincennes, 1 at Sullivan, 11 at Terre Haute, 4 at Danville, and 1 at Watseka, and 3 left the train at Terre Haute, 3 at Danville, 8 at Steger and 139 at Chicago. Thus, the record shows that the C&EI points south of Chicago have had few passengers boarding or leaving the trains.

C&EI's balance sheet statement as of July 31, 1967, shows assets aggregating $119,182,901, including current assets of $10,220,039, special funds $484,841, investments $10,941,671, total properties less depreciation and amortization $96,182,478, and other assets and deferred charges $1,353,872. Liabilities were: current liabilities of $9,631,117, long-term debt of $53,494,944 (including $3,103,470

due within 1 year), reserves $659,983, other liabilities and deferred credits $619,844, capital stock $29,837,372, capital surplus $112,522, and retained income $24,827,119. Its income statements for 1965, 1966 and first 7 months of 1967, show railway operating revenues of $40,578,936, $41,780,952, and $23,604,275; net railway operating income of $3,486,070, $4,091,786, and a deficit of $1,005,900; and net income after fixed charges and other deductions of $1,736,086, $2,853,372, and a net deficit of $1,757,265, respectively.

C&EI has incurred annual net railway operating deficits in its passenger service in amounts in excess of $1 million for the years 1962 through 1966, inclusive. More than 20 percent of freight net income has been required to subsidize these rail passenger deficits in each of the years 1957 through 1966, except 1959 when the percent of freight net income so required exceeded 12 percent. C&EI estimates that the national award of September 16, 1967 to the shopcraft employees, retroactive to January 1, 1967, will increase its labor costs by $210,000 in 1967 and by $321,000 in 1968. Further, a recent agreement with the Brotherhood of Locomotive Engineers will result in payment of $100,000 to C&EI locomotive engineers in backpay. None of those additional expenses were included in determining the cost of operating the subject trains during the first 6 months of 1967, or in projections made.

C&EI shows data respecting the financial results of the operation of the trains for the years 1965, 1966, and the first 6 months of 1967. In 1965, train No. 93 had revenues (passenger, diner, express and mail) of $1,096,607 and out-of-pocket expenses of $1,001,950 for a net income of $94,657. For the same year, train No. 54 had similar revenues of $811,156, and out-of-pocket expenses of $862,270 for a net out-of-pocket loss of $51,114. In 1966, the corresponding figures for train No. 93 were $1,083,494 revenues, $1,125,287 costs, and $41,793 deficit; for train No. 54 they

were $816,863 revenues, $1,022,127 costs, and $205,264 deficit; the combined net loss for both trains was $247,037. In the first 6 months of 1967, the corresponding figures for train No. 93 were $420,167 revenues, $522,421 costs, and $102,254 deficit, and for train No. 54, $311,281 revenues, $477,387 costs, and $166,106 deficit; the combined net out-of-pocket loss was $268,360. Details of the revenues and expenses for those periods indicated as computed by the carrier are shown in the attached appendix A.

As indicated, actual revenues from these trains, including carbire revenue are reflected in the data presented. The following actual expenses were also employed: Train engineman expense, traincrew expense, sleeping car expense, insurance, expenses incurred in clearing wrecks, baggage loss and damage claims, injuries to persons and dining car and buffet car service. Other expenses and savings data were computed using methods approved by the Commission in prior proceedings. Increases in expenses for 1966 over those of 1965 occurred in four accounts (a) passenger train cars—repairs, (b) equipment depreciation—passenger cars, (c) train supplies and expenses, and (d) joint facility accounts. These were the subject of detailed inquiry. On (a) an accident to train No. 93 at Hoopeston in April 1966, were required extensive repairs to passenger cars ($59,506). Expenses charged to that account in 1965 were abnormally low. On (b) C&EI did not, until 1967, retire its head-end equipment used on other trains in 1965 and 1966, having made such equipment available to the U. S. Post Office Department for use in trains Nos. 93 and 54. Retirements of head-end equipment in 1967, when mail was removed from all C&EI passenger trains amounted to $365,549, but this increase in expense was not reflected in the financial results discussed above. In projecting revenues and expenses involved in operating the subject trains without the mail

revenue equipment, depreciation on only those cars which would be required to operate the subject trains without any head-end business was considered. On (c) the total passenger portion of the account actually decreased in 1966, but spreading the expense over fewer trains than in 1965, resulted in an increased allocation to the remaining trains. On (d) the increase in joint facility expenses in 1966 was due to the discontinuance of passenger trains by other railroads using such facilities, which added proportionally to the expense burden on the remaining trains.

Trains Nos. 93 and 54 use joint facilities at Chicago with four other railroads, and with one other at Terre Haute, Vincennes, and Evansville. During the first 6 months of 1967, no C&EI passenger trains, other than the subject trains used the Terre Haute, Vincennes and Evansville facilities, and as a result, all of the amounts paid for use of those facilities ($25,356, $18,136, and $104,328, respectively) are savable. Joint facility costs were computed in accordance with those methods and standards approved in *Chicago, R. I. & P. Co., Discontinuance of Trains*, 328 I.C.C. 278.

The foregoing data reflect revenues received by C&EI for transportation of mail. Projected annual revenues and out-of-pocket expenses, exclusive of mail traffic, using 1966 revenue data, show that C&EI would incur an annual loss of $242,850 in the operation of train No. 93 and $191,780 in the operation of train No. 54. In projecting equipment depreciation and other expense items only the equipment that actually would be used was considered. The projected annual revenues and out-of-pocket expenses, exclusive of mail traffic, were shown as follows:

	Train No. 93	Train No. 94
Revenues:		
102 Coach[1]	$532,953	$468,549
102 First class[1]	87,680	113,593
103-108 Baggage and other[1]	2,270	1,153
107 Express[2]	587	34,909
131 Dining and buffet[1]	47,844	47,844
Total revenue	671,334	666,048
505-538 Car-hire, net[3]	4,785	4,785
Revenue and income	676,119	670,833
Total expense	918,969	862,563
Profit or loss	(242,850)	(191,730)
Expenses:		
Maintenance of equipment—		
311 Repairs, diesel locomotives[4]	53,406	53,390
317 Passenger train car repairs[5]	141,817	141,817
331 Equipment depreciation—locomotive[6]	8,760	8,760
331 Equipment depreciation—cars[7]	30,103	30,103
335 Employee health and welfare benefits[8]	2,502	2,502
Traffic:		
351-360 Passenger traffic[4]	21,996	16,036
Transportation:		
373 Station employees[4]	15,650	14,568
376 Station supplies and expense[4]	3,062	2,768
378 Yard conductor and brakeman[9]	5,532	5,532
392 Train enginemen[10]	50,193	52,987
394 Train fuel[11]	30,400	30,400
397 Water for train locomotion[11]	1,781	1,781
398 Lubrication for train locomotion[11]	3,709	3,709
399 Other supplies for train locomotion[11]	168	168
400 Enginehouse expense—train[11]	8,108	8,108
401 Trainmen[10]	67,844	67,134
402 Train supplies and expenses[12]	88,308	88,308
403 Operating sleeping cars[4]	49,060	37,392
409 Employee health and welfare benefits[8]	5,163	5,222
Insurance[13]	16,405	16,405
419 Loss and damage—baggage[14]	550	480
420 Injuries to persons[14]	41,044	2,754
441 Dining and buffet service[4]	71,188	71,188

	Train No. 93	Train No. 54
Revenues:		
General:		
452 Clerks, accounting[4]	9,142	8,438
456 Employee health and welfare benefits[4]	360	324
All joint facility accounts[15]	170,720	170,720
532 Railway tax accruals[16]	21,958	21,542
Total expenses	918,969	862,563

[1] 1966 actual. The number preceding each item is the account number in the Commission's Uniform System of Accounts.
[2] Projected based on current traffic.
[3] Projected based on car assignments.
[4] Projected based on first 6 months 1967 expenses.
[5] Projected based on estimated car miles @ first 6 months 1967 cost per car mile.
[6] Based on two unit assignment.
[7] Based on cars required.
[8] Based on current G.M.A. rates applied to labor only.
[9] Based on current assignment.
[10] Based on 1966 payments plus wage increases.
[11] Based on 2 unit assignment @ first month 1967 cost per unit miles.
[12] Based on estimated car mile @ first 6 months 1967 cost per mile plus crews' lodging and meals at current costs.
[13] Based on current premiums.
[14] Based on 2.5 year average.
[15] Based on estimated car assignments.
[16] Based on current rates applied to labor only.

It is thus apparent that C&EI has incurred substantial losses in the operation of the trains Nos. 93 and 54 and that the losses will substantially increase as a result of the Post Office Department's removal of mail from those trains and the consequent discontinuance of passenger trains of other railroads using the Chicago terminal facility, although the latter factor was not considered in making the above projections.

Eight communities on the line served by the subject trains intervened in opposition: Chicago, Watseka, Mil-

ford, Hoopeston, and Danville, Ill., and Terre Haute, Vincennes, and Evansville, Ind. The trains do not serve Milford. Although some Illinois residents who ride C&EI train No. 4 northbound return on train No. 93 southbound, the witnesses testifying at communities in Illinois were primarily interested in the continued operation of trains Nos. 3 and 4. The latter are the subject of the section 13a(2) proceeding in Finance Docket No. 24726 and, under the provisions of that section, are being dealt with in the report of the hearing examiner. Indiana interveners and witnesses testifying at Indiana points were concerned with continued operation of the subject trains.

Of the 144 public witnesses who testified on the consolidated record, 90 directed their testimony in whole or in part to the subject trains. Not all use the services of the trains. Thirty-one testified on behalf of State, county, city government or municipal organizations, civic or trade organizations, and colleges or universities, and one presented the views of a Congressman. A number were concerned with rail passenger service generally, though they themselves did not use the services provided by the subject trains. With few exceptions the public witnesses desire the trains continued in what would be a standby service for use as convenience in bad weather, at holiday periods and for shopping trips. No public witnesses testified at Chicago.

At Watseka, the mayor and representatives of the chamber of commerce and the County Farm Bureau indicated that, although they do not use the subject trains, there is need for rail passenger service in inducing industry to locate in the area. A surgeon testified to using the trains 20-24 times a year to and from Chicago where, he indicates, an increasing number of his patients require medical service. He owns an automobile, but does not use it on long trips.

At Hoopeston, the mayor and the president of the chamber of commerce expressed concern over rail passenger service. Testimony was given by a department store buyer and a beautician. Two personnel managers of large corporations indicated that prospective employees inquire about transportation facilities to and from Chicago. One could express no opinion as to whether discontinuance of the subject trains would have a detrimental effect on recruiting employees in Hoopeston; the other uses other trains of C&EI and was more concerned with their retention. The president of the Hoopeston Industrial Corporation points out that every prospective industry mentions transportation. A representative of a corn festival held annually each September in Hoopeston urges continuation of the service, but of the 100,000 persons attending the last occasion, he knew of only four who came by rail. The foregoing witnesses themselves rarely patronize the subject trains. Another witness rides train No. 93 during unusually heavy snowstorms when other means of travel are not available.

At Danville, municipal, commercial and other organizational spokesmen were concerned with rail passenger service generally and specifically C&EI trains other than those here involved. Several other witnesses proved to be only occasional patrons of trains Nos. 93 and 54—a bookkeeper, a number of railroad employees (who rated their on-time performance as poor), a housewife (who finds them crowded and often late), another housewife whose children sometimes use the trains going to and from colleges (particularly in bad weather), and an architect who expressed the view that the discontinuance would hamper Danville's development. Another witness who uses C&EI trains about once a month, occasionally drives his automobile to Chicago, but would not go by bus because he considers the bus routes circuitous and the service time consuming. Support for continued operation was voiced by a junior chamber of commerce spokesman for 110 mem-

bers who testified that he used the trains only once, but that the majority of the membership use all C&EI trains; and by the chamber of commerce (representing 116 manufacturing firms) as part of its program to promote improvement in transportation. Several manufacturing organizations indicated that some of their employees occasionally use the trains. Spokesmen for three civic organizations use the trains several times a year, particularly during inclement weather, but also have used alternate transportation, including private automobile. A number of the witnesses testified that the northbound train is frequently late and dirty, that this was reported to the railroad and that there was little effective response.

At Evansville, the mayor and a State senator opined that discontinuance of the trains would be detrimental to the growth of industry and commerce in the community. The mayor uses air service on many occasions and uses rail service about once every 6 months. The senator does not have occasion to use C&EI's service. The chamber of commerce spokesman urged that the discontinuance be deferred until L&N acquires the eastern side of C&EI's line, although the transportation division which he represents voted six to three against opposing discontinuance. An aide to a member of Congress from Indiana presented the Congressman's views that rail passenger transportation service is vital to the economic growth of the community, and that all modes of transportation must be kept available. Other witnesses testified to a preference for rail over alternate modes for the occasional trips they take, though some of them found the rail cars crowded, dirty and sometimes unheated. Among them was the representative of a religious community having 30 nuns stationed at Evansville. She indicated that her order's recent transportation requirements were accomplished through use of charter bus service, and that the sisters have sufficient automobiles at their disposal.

At Vincennes, the mayor opposed the discontinuance but, in so doing, was not supported by the city council. The chamber of commerce mailed 475 questionnaires to area residents regarding the proposed discontinuance; 82 were returned showing a 3 to 1 preference for keeping the trains on. A survey at Vincennes University revealed that 22 of the 2,243 students use the trains. Members of the faculty use them twice a year. Seven students said they hope to use them more frequently, particularly during bad weather. A number of other witnesses—all of them only occasional users—complained about the condition of the trains and the station at Vincennes, about a poor on-time record, crowded and dirty equipment. All of the above witnesses urge continuation of the service with improvement of quality.

At Terre Haute, the mayor pressed the view that passenger train service is needed in the development of industry and commerce. On his six trips to Chicago in the past year he used train service once when his air flight was grounded on account of bad weather. The chamber of commerce cited statistics showing growth in population, commerce, enrollment in the universities and retail sales as yardsticks of a demand for improved service. Aware that loss of mail revenues has precipitated discontinuance of passenger rail service, it argued that the railroad should consider providing complete service, freight and passenger, and should look to the passenger market as any other business man looks at a new market. Further, that a successful company expects to absorb departmental losses within its gross earnings in order to provide a complete service. Professors and students of a local university, opposing the discontinuance, testified to their use of the trains variously from regular weekend use to once or twice a year during inclement weather. Student ownership of automobiles by upper classmen is permitted and some of the students use the trains only when they cannot

obtain automobile transportation. Student use of the trains is primarily on holidays and at the beginning and end of summer vacation. While enrollment at the local university has more than doubled in the past 6 or 7 years, use of the trains at Terre Haute has continued to decline.

A religious order with national headquarters at nearby St. Mary of the Woods has 350 members who ride the trains to Chicago twice annually for connections east and west thereof. The order has a number of automobiles at its disposal and has used them and bus service for Chicago trips. In advertising for its college the order would like to be in a position to advise prospective students that easy access is available via rail among other modes. It has had some difficulty with on-time performance of the trains, particularly in making connections. The college has about 400 students, a number of whom are from the Chicago area.

Some evidence was presented to show the carrier's car-cleaning program and the problems involved. Sometimes delay in arrival at Chicago requires quick turnaround, and cleaning of the cars leaves much to be desired. The record indicates that C&EI has made some effort to overcome the problem but must deal with C&WI which maintains the Chicago terminal facility.

Discussion and conclusions.—Numerous factors are considered in determining whether to order the continuance of service under section 13a(1) of the act. Among them are public use of the service, population of the area, effect of a train discontinuance upon the communities served, available alternate transportation, financial results of the operation, prospects for the future, and the carrier's financial condition. The weight to be given each factor depends on the circumstances in a particular case. No one factor is necessarily controlling. The intent of Congress in enacting section 13a was to enable carriers to discontinue train services that no longer pay their way, and for which

there is no longer sufficient public need to justify the financial loss involved. See *Southern Ry. Co.* v. *North Carolina*, 376 U.S. 93.

At one time the passenger train was the pride of the transportation system. This was especially so in the United States where there was vast wilderness to be tamed, rich deposits of natural resources to be tapped, and large, widely-separated cities to be connected. The railroad and its passenger trains provided the strands for tying the far-flung areas together, and the channels for rapid, efficient communication and transport. Time and inventive genius created more efficient means for performing a number of the functions for which we formerly relied on the rails. Electronics provide instant communication, and airplanes cut transport time tremendously for people, mail and express. The automobile and the supper highway—for which the American people have a special fascination—provide particular convenience which other modes cannot duplicate.

The evidence now before us shows that the subject trains no longer are used by express shippers (except for some movements between Chicago and Chattanooga), or by the Post Office Department for mail (once a highly remunerative source of traffic and a primary source of sustenance for passenger trains). Passenger traffic has been dwindling. In the meantime, costs continue upward inexorably. The general rise in costs throughout the economy are reflected in the railroad's expenses for employees, equipment, fuel, supplies, facilities and services. With the loss of mail revenues making a dramatice change in the financial results of the operation, C&EI would have to absorb an out-of-pocket deficit well over $400,000 per year in order to continue trains Nos. 93 and 54. It is likely that the deficit would go beyond a half million dollars.

Financially, this carrier is at best marginal. It has a history of deficit operation and is beset with numerous

problems flowing therefrom regarding rehabilitation of its line and recovery of traffic. See *Missouri Pac. R. Co. —Control—Chicago & E. I. R. Co.*, 327 I.C.C. 279 (1965). The slender profit shown on this record for 1965 and 1966 occurred at the height of a record breaking period of national prosperity. The relatively slight slowdown in the national economy during 1967 had an immediate and telling effect on C&EI's operation, creating a net deficit of nearly $2 million in the first 7 months of the year. C&EI is an important link in the national rail system and from the point of service in its own area and as an integral part of the national system, its viability is a thing much to be desired. Continuance of the subject trains would militate against that objective. There is no reasonable prospect for relief from the financial burdens imposed by those trains. To the contrary, all indications are that the burdens would mount. And this, in turn, would soon intensify the railroad's malaise, all to the detriment of the public.

The people who have been using the trains for travel have done so largely on an occasional or standby basis. Their primary means of conveyance are the automobile and other nonrail modes. The testimony of the governmental leaders, business representatives, students and housewives is clear proof of that. The witnesses themselves appear to prefer air and automobile travel. Many gave opinions about a need for rail passenger service in the interest of community and commercial growth, but few hard, realistic facts were advanced by them in support. The passenger use statistics stand as stark proof that, regardless of what is felt and said, the people along the C&EI's Evansville-Chicago line are not using the trains. Their patronage is minimal.

For those who must depend upon public transportation, bus service is far more plentiful than the train service—at all points on the line. Use of the buses will require

an adjustment, but whatever inconvenience might be experienced does not outweigh, on the scale of the public interest, the tremendous burden continued operation of the trains would involve. We conclude that discontinuance by C&EI of trains Nos. 93 and 54 is consistent with the purpose of section 13a(1) of the act, and the objectives of the national transportation policy.

Certain railway employees seek imposition of the *Burlington* or similar conditions in the event the discontinuance is authorized. Similar requests have been considered in prior proceedings of this nature, and the Commission has uniformly held that we do not possess authority to impose conditions for the protection of railway employees who may be adversely affected as a result of the discontinuance of passenger service under section 13a(1). See *Great Northern Ry. Co. Discontinuance of Service*, 307 I.C.C. 59. However, the probable effect of such discontinuance on employees is a matter to be considered in determining whether the public convenience and necessity require the continuance of such service. We have considered that factor, and, in our opinion, the probable adverse effect upon employees does not afford sufficient grounds to order continuance of the service.

Contentions of the parties as to fact or law not specifically discussed herein have nevertheless been considered and found to be without merit or material significance.

We find that the operation by the Chicago & Eastern Illinois Railroad Company of passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., is not required by the public convenience and necessity and that continued operation thereof would unduly burden interstate or foreign commerce.

An appropriate order will be entered discontinuing the investigation herein.

APPENDIX A

Statement of revenues and expenses for trains Nos. 93 and 94 in 1965, 1966 and 6 months of 1967

	1965		1966		Six Months 1967	
	Train No. 93	Train No. 94	Train No. 93	Train No. 94	Train No. 93	Train No. 94
Revenues:						
102 Coach (1)	$ 516,762	$ 480,139	$ 532,953	$ 468,549	$ 235,039	$ 197,355
102 First class (1)	90,033	172,097	87,480	113,593	33,631	49,172
103-108 Baggage & other (1)	1,606	493	2,270	1,153	2,970	1,315
106 Mail-RPO (1)	81,043	82,304	82,843	82,843	42,483	42,483
106 Mail-storage (1)	305,137	50,854	305,621	96,111	110,356	37,310
107 Express (1)	4,311	9066	2,955	4,762	7,258	6,436
131 Dining & buffet (1)	45,874	45,875	47,844	47,844	18,910	18,910
Total Revenue	1,044,783	782,988	1,062,966	825,855	426,167	353,581
505-538 Car hire, net (1)	31,842	48,488	21,328	2,008	(282)	(3,900)
Total Income (2)	1,076,807	831,196	1,083,670	819,987	426,167	351,781
Total Expense (See below)	1,001,950	862,270	1,125,787	1,022,127	527,621	477,387
PROFIT OR (LOSS)	74,857	(31,114)	(41,797)	(202,284)	(101,254)	(125,606)
Maintenance of Equipment:						
311 Repairs, diesel locomotives (3)	54,497	54,897	70,299	70,959	26,763	28,693
317 Passenger-train car-Repair (4)	89,300	72,511	174,853	163,022	75,937	70,866
331 Equip.Deprn.(52)Loco.(5)	12,996	12,996	12,996	12,996	6,498	6,498
331 Equip.Deprn.(56)Pass.Cars(6)	34,031	33,739	59,211	58,431	28,698	27,881
335 Emp. RRR benefits (7)	2,354	2,175	2,916	2,841	1,399	1,350
Traffic:						
351-360 Passenger Traffic (8)	17,896	15,539	19,959	16,914	10,998	8,818
Transportation:						
373 Station employees (9)	67,445	26,764	66,723	29,376	24,154	11,661
376 Sta. supplies & exp. (10)	2,568	2,568	2,568	2,568	1,531	1,386
378 Yard Cond. & Brkmn. (11)	1,436	1,436	1,661	1,661	1,832	1,832
392 Train enginemen (1)	48,649	31,393	47,803	50,369	23,674	24,517
394 Train Fuel (3)	58,187	58,616	46,150	44,583	18,607	18,401
397 Water for train Loco. (3)	1,506	1,517	2,486	2,510	1,078	1,078
398 Lube. for train Loco. (3)	2,746	2,766	3,127	3,156	2,245	2,245
399 Other supplies for train loco. (3)	648	654	377	380	101	101
400 Engine. expense train (3)	14,820	14,929	12,395	12,511	4,909	4,908
401 Trainmen (1)	61,163	61,861	64,651	63,937	29,278	29,201
402 Train supplies & exp. (12)	44,778	57,268	89,105	84,673	47,025	44,627
403 Operating sleeping cars (1)	44,199	44,585	41,171	31,561	24,530	18,896
409 Emp. RRR benefits (13)	7,727	6,136	8,394	5,908	2,490	2,448
insurance (1)	12,172	12,172	12,178	12,178	8,764	8,764
415 Clearing wrecks (1)	---	---	4,987	---	---	---
419 Loss & damage-baggage (1)	230	20	482	---	444	444
420 Injuries to persons (1)	78,330	2,375	22,782	2,593	11,000	1,667
441 Dining & buffet serv. (1)	69,161	69,161	78,839	78,839	35,594	35,594
General:						
452 Clerks, accounting (14)	13,566	13,566	10,972	10,292	4,571	4,139
456 Emp. RRR benefits (15)	580	576	629	604	180	162
All Joint Facility Accounts (16)	212,554	215,158	246,132	236,097	119,698	113,867
532 Ry. tax accruals (17)	24,350	20,196	29,631	25,281	10,992	10,622
TOTAL EXPENSES:	1,001,950	862,270	1,125,787	1,022,127	527,621	477,387

NOTES:

(1) Actual.
(2) Revenue plus car hire.
(3) Passenger portion of account divided by passenger unit-miles times unit-miles per train.
(4) Passenger portion of account divided by passenger car-miles exclusive of sleeping car-miles times actual car-miles per train.
(5) At I.C.C. rates distributed to trains on basis of units assigned.
(6) At I.C.C. rates distributed to trains on basis of actual car-miles.
(7) G.M.A. rates applied to labor portion of accounts Nos. 311 and 317.
(8) Distributed on basis of revenue pro rata.
(9) Includes mail handlers, also C&EI station employees.
(10) Trains Nos. 93 and 94's portion of Danville depot expense.
(11) Evansville border - actual.
(12) Passenger portion of account divided by passenger car-miles including sleeping car-miles.
(13) G.M.A. rates applied to labor portion of accounts Nos. 373, 378, 392 and 401.
(14) Revenue pro rata of actual wages.
(15) G.M.A. rates applied to labor portion of account No. 452.
(16) Savable portion of joint facility expense at Chicago, Terre Haute, Vincennes and Evansville.
(17) R.R. and U.I. rates (G.M.A.) applied to labor portion of accounts Nos. 311, 317, 351 through 360, 373, 378, 392, 401 and 452.

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 25th day of January 1968.

Finance Docket No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—DISCONTINUANCE OF TRAINS NOS. 93 AND 54 BETWEEN CHICAGO, ILL. AND EVANSVILLE, IND.

Investigation of the matters and things involved in this proceeding having been made pursuant to the order of said division, dated September 18, 1967, a hearing having been held and the said division on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That this investigation be, and it is hereby discontinued, and that this order shall be effective 35 days from the date hereof.

By the Commission, division 3.

H. NEIL GARSON,
Secretary.

(SEAL)

Service Date
May 15, 1968

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 8th day of May, 1968.

Finance Docket No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—DISCONTINUANCE OF TRAINS NOS. 93 AND 54 BETWEEN CHICAGO, ILL. AND EVANSVILLE, IND.

Upon consideration of the record in the above-titled proceedings, including the petition filed by the Cities of Chicago, Danville, Hoopeston, Terre Haute, Vincennes, and Watseka and the Village of Milford, on March 1, 1968, for reconsideration of the order of the Commission, Division 3, dated January 25, 1968, authorizing the above-titled discontinuance; applicant's reply thereto; petitioners' motion to strike certain matter appearing in the reply; and applicant's reply to the motion; and

It appearing, That the matters appearing in the reply to the petition objected to in the motion to strike are not of record in this proceeding and therefore not properly before this Commission as evidence and that no objection is made to the motion to strike;

It further appearing, That in order to invoke the jurisdiction of this Commission under section 13a(1) of the Interstate Commerce Act a carrier must comply with certain requirements, including the posting of notice "in each station, depot, or other facility involved" (49 CFR 43.5 (j)), which notice must contain a "complete description of the present service of the train . . . involved and of the discontinuance or change of operation or service pro-

posed" (49 CFR 43.5(c)); and that the purpose of requiring such notice is to give the travelling public affected the opportunity to protest the proposed discontinuance; and

It further appearing, That applicant in the above-titled proceeding failed to give the proper notice required, as described above, in that no notice was posted in those facilities along the through route of trains Nos. 93 and 54 south of Evansville, Ind., and the notice as posted contained no mention of the through-route nature of the trains south of Evansville; and that applicant therefore has not effectively invoked the jurisdiction of this Commission in the above-titled proceeding:

It is ordered, That the motion to strike certain matters appearing in applicant's reply to the petition for reconsideration be, and it is hereby, granted;

It is further ordered, That the petition, insofar as it seeks dismissal of the above-entitled proceeding for failure to invoke this Commission's jurisdiction under section 13a(1), be, and it is hereby, granted, and in all other respects is denied.

By the Commission, Division 3, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

(SEAL)

Service Date
May 15, 1968

Corrected Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 8th day of May, 1968.

Finance Docket No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—DISCONTINUANCE OF TRAINS NOS. 93 AND 54 BETWEEN CHICAGO, ILL. AND EVANSVILLE, IND.

Upon consideration of the record in the above-titled proceedings, including the petition filed by the Cities of Chicago, Danville, Hoopeston, Terre Haute, Vincennes, and Watseka and the Village of Milford, on March 1, 1968, for reconsideration of the order of the Commission, Division 3, dated January 25, 1968, authorizing the above-titled discontinuance; applicant's reply thereto; petitioners' motion to strike certain matter appearing in the reply; and applicant's reply to the motion; and

It appearing, That the order of the Commission, Division 3, acting as an Appellate Division, dated May 8, 1968, and served earlier on May 15, 1968, erroneously indicated that the Commission had granted the petition insofar as it sought dismissal of the above-titled proceeding for failure to properly invoke this Commission's jurisdiction under section 13a(1);

It further appearing, That the matters appearing in the reply to the petition objected to in the motion to strike are not of record in this proceeding and therefore not properly before this Commission as evidence and that no objection is made to the motion to strike;

It further appearing, That in order to invoke the jurisdiction of this Commission under section 13a(1) of the Interstate Commerce Act a carrier must comply with certain requirements, including the posting of notice "in each station, depot, or other facility involved" (49 CFR 43.5 (j)), which notice must contain a "complete description of the present service of the train . . . involved and of the discontinuance or change of operation or service proposed" (49 CFR 43.5(c)); and that the purpose of requiring such notice is to give the travelling public affected the opportunity to protest the proposed discontinuance;

It further appearing, That applicant in the above-titled proceeding gave the proper notice required, as described above; and

It further appearing, That no other new issues are raised or evidence of substance offered to support the request for reconsideration, and good cause has not been shown for granting the relief requested;

It is ordered, That the motion to strike certain matters appearing in applicant's reply to the petition for reconsideration be, and it is hereby, granted;

It is further ordered, That the petition for reconsideration be, and it is hereby, denied in all respects.

By the Commission, Division 3, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

(SEAL)

SERVICE DATE
APRIL 26, 1968

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 24th day of April, 1968.

Finance Docket No. 25047

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
DISCONTINUANCE OF TRAINS NOS. 6 AND 7
BETWEEN NEW ORLEANS, LA., AND
CINCINNATI, OHIO

It appearing, That on April 3, 1968, the Louisville and Nashville Railroad Company filed with this Commission notices under section 13a(1) of the Interstate Commerce Act, as amended, that effective May 8, 1968 said carrier will discontinue service of its passenger trains Nos. 6 and 7 between New Orleans, La., and Cincinnati, Ohio;

It further appearing, That complaints by certain individuals, associations, state commissions, communities, and by railway employees have been received requesting suspension of the proposed discontinuance pending investigation to determine the extent of public need for the trains in question;

It further appearing, That discontinuance of the said trains service by the Louisville and Nashville Railroad Company may not be warranted by the public convenience and necessity, and that operation of such service may not unduly burden interstate commerce;

It further appearing, That the due and timely execution of this Commission's functions in this proceeding imperatively and unavoidably requires the omission of an examiner's recommended decision herein, for the reason that under the provisions of section 13a(1) of the Interstate Commerce Act, the said train service may be discontinued

unless a decision herein is made before expiration of the four-month period hereinafter provided for;

It is ordered, That an investigation of the proposed discontinuance of train service described hereinabove, be, and it is hereby, instituted under the provision of section 13a(1) of the Interstate Commerce Act, and that the matter be assigned for hearing at a time and place hereafter to be fixed;

It is further ordered, That the train service described hereinabove be continued pending hearing and decision in said investigation, but not for a longer period than four months beyond the date when the discontinuance otherwise would have become effective unless otherwise ordered herein; and

It is further ordered, That a recommended decision by the examiner to whom the investigation is assigned for hearing be omitted as part of the decision-making process in this proceeding, and the record herein shall be considered as certified to the Commission, Division 3, for initial decision when received by the Secretary of the Commission for filing in the docket.

By the Commission, Division 3.

/s/ H. Neil Garson
Secretary.

(SEAL)

Finance Docket No. 25047

Louisville and Nashville Railroad Company Discontinuance of Trains Nos. 6 and 7 Between New Orleans, La., and Cincinnati, Ohio

Decided September 3, 1968

Upon investigation, found that the continuance of operation by the Louisville and Nashville Railroad Company of its passenger trains Nos. 6 and 7 between New Orleans, La., and Cincinnati, Ohio, is not required by public convenience and necessity and that the continued operation thereof will burden interstate commerce. Investigation discontinued.

Clifford T. Coomes, Charles B. Arendall, Jr., Thomas S. Lawson, Jr., James E. Simpson, David M. Keeble, and *Robert T. McConaughy* for the Louisville and Nashville Railroad Company.

Weldon A. Cousins, Langdon D. Bell, Nat K. Knight, Bennett E. Smith, Robert A. Jones, Eugene W. Ward, James Kenneth Atkins, and *Chester L. Rigsby* for regulatory agencies of the States of Louisiana, Mississippi, Alabama, Tennessee, Kentucky, and Ohio, protestants.

Louis A. Schwartz, Lawrence F. Daspit, Horace Perry, William A. Thompson, Robert E. Kendrick, Rom McGrath, Raymond F. Simon, and *Bernard Rane* for protestants.

S. F. Walker, F. T. Edwards, Olin B. Brooks, Leslie Stifflemire, P. A. Young, Clifford H. Rex, Joe Hester, Henry E. Risner, John B. Mullins, Jr., J. W. Faust, J. G. Griffin, Alex E. Little, Harry T. Smith, W. R. Selby, A. L. Shepherd, and *Robert C. Tyler* for railway labor organizations, protestants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, BUSH, AND DEASON

TUGGLE, *Commissioner:*

Pursuant to the provisions of section 13a(1) of the Interstate Commerce Act, the Louisville and Nashville Railroad Company (L&N), a common carrier by railroad subject to the provisions of part I of the act, filed a notice and statement on April 3, 1968, in which it proposed to discontinue, effective May 7, 1968, the operation of its passenger trains Nos. 6 and 7 operating between New Orleans, La., and Cincinnati, Ohio, a distance of 927 miles. Copies of the notice were served and posted in the manner prescribed by section 13a(1) of the act and related rules and regulations.

Upon receipt of numerous petitions and letters of protest, an investigation of the proposed discontinuance of service was instituted by our order dated April 24, 1968, which required continued operation of the trains for a period not exceeding 4 months beyond the date when the discontinuance would have become effective. Because of the statutory limitaion upon the time available for investigation and decision, the order provided for the omission of a report and recommended order by the hearing examiner and for certification of the record to us for initial decision. Hearings were held at New Orleans, La., Mobile, Montgomery, and Birmingham, Ala., Nashville, Tenn., Louisville, Ky., and Cincinnati, Ohio. Briefs have been filed.

The trains.—Train No. 6 operates northbound daily from New Orleans to Cincinnati departing New Orleans 8:15 a.m. and arriving Cincinnati 8:10 a.m. the next morning. Train No. 7 operates southbound daily from Cincinnati departing Cincinnati 7:40 p.m. and arriving New Orleans 8:10 p.m. the next evening. The schedule of the trains, the points served, and their populations are set forth in appendix A.

Train consists and crews.—The regular consist of northbound train No. 6 is one double-unit diesel locomotive, one coach, one sleeping car, and one baggage-express car, New Orleans to Cincinnati, daily; one dining car, New Orleans to Nashville, daily; one dormitory car, Montgomery to Nashville, daily; one coach, Montgomery to Louisville, 3 days a week; from one to four express cars. Nashville to Cincinnati, 4 days a week; one storage-mail car, Louisville to Cincinnati, 4 days a week; and one mail-express car, Louisville to Cincinnati, 3 days a week.

The regular consist of southbound train No. 7 is one double-unit diesel locomotive, one coach, and one sleeping car, Cincinnati to New Orleans, daily; one or more express cars, Cincinnati to Louisville, at irregular intervals; one storage-mail car, Cincinnati to Nashville, daily; one baggage-mail car, Cincinnati to Montgomery, daily; one mail-express car, Louisville to Nashville, 6 days a week; one express car, Louisville to Nashville, 3 days a week; one coach, Louisville to Montgomery, 3 days a week; one dining car, Nashville to New Orleans, daily; one dormitory car, Nashville to Montgomery, daily; one storage-mail car, one baggage-mail car, and one coach, Montgomery to New Orleans, daily.

The equipment is described as modern and well maintained and the passenger cars are the newest owned by the carrier. The locomotive equipment would be retired and the car equipment transferred to other trains as replacements of older equipment.

Train No. 6 employes 6 engineers, 6 firemen, 5 conductors, 5 flagmen, 2 baggagemen, 2 coach attendants, 3 dining car employees, and a pullman porter for a total of 30 crew members. Train No. 7 employs the same number of employees in each of the same categories except 1 less conductor for a total of 29 crew members.

Other persons required for the operation of the trains include station and terminal employees who sell tickets,

operators and dispatchers charged with actual operation of the trains, yardcrews who form the trains and work on train equipment, car department employees who inspect, maintain, and clean the car equipment, and mechanial employees who maintain the required motor power.

One position in each pullman car would be eliminated; the personnel involved are not employees of the carrier.

Following the proposed discontinuance, the on-train crews would be employed in other services; they all maintain freight seniority and could be used in freight related positions. Those with insufficient seniority might be assigned to extra boards.

Use of passenger service.—In the respective periods of 1966, 1967, and 1968 (the last, annualized on the basis of data for February 1 to April 30, 1968), the passenger miles of the trains were 52,848,271, 48,668,491, and 22,035,336. In the respective periods of November and December 1967, January, February, March, and April 1968, the average number of passengers per train-mile on train No. 6 was 47, 82.6, 54.4, 30.4, 36.4, and 35.7. During the same periods the average number of passengers per train-mile on train No. 7 was 43.3, 85.4, 50.7, 30.9, 31, and 34.3.

Appendix B reflects the daily average "on" and "off" counts at all stations between New Orleans and Cincinnati for a 6-month period November 1, 1967 to April 30, 1968. The symbols (OC) and (L&N byd) refer to passengers transferring from other railroads and passengers transferring to other L&N trains. On train No. 6, the only intermediate points having an average of 8 or more passengers per day "on" or "off" were Pasagoula (10), Mobile (15), Montgomery (24), Birmingham (25), Decatur (8), Nashville (32), and Louisville (12). On train No. 7 the only intermediate points having a daily average of 7 or more were Louisville (20), Bowling Green (15), Nashville (30), Decatur (7), Birmingham (22), Montgomery (20), and Mobile (17).

Alternate transportation.—In addition to the trains proposed for discontinuance, L&N operates daily trains Nos. 8 and 9 (the Pan American) between New Orleans and Cincinnati, serving the same intermediate points, except Rigolets, La., a conditional stop on train No. 7. Train No. 8 departs New Orleans at 8:45 p.m., as compared with train No. 6's morning departure, and arrives Cincinnati at 9:30 p.m., the following evening. Train No. 9 departs Cincinnati 9:15 a.m., as compared with train No. 7's evening departure, and arrives New Orleans 7:55 a.m., the following morning. L&N also operates trains Nos. 15 and 16 (the South Wind) every other day, between Louisville and Montgomery, serving the same intermediate points as its other four trains. In connection with the Penn Central Railroad and the Seaboard Coast Line Railroad, the South Wind provides through service between Chicago, Ill., and certain Florida points, including Miami and St. Petersburg. Through service would remain between New Orleans and Atlanta, Ga., by change of schedule by the Atlanta and West Point Railroad (A&WP) between Atlanta and Montgomery, the latter an interchange point with the L&N, whereby A&WP would connect with L&N train No. 9 rather than with L&N No. 7 as at present.

All L&N stations here involved, except Rigolets, have direct daily bus service between New Orleans and Cincinnati. There are as many as 21 bus schedules between the various points, depending upon the populations.

Daily scheduled airline service is available between Cincinnati, Louisville, Bowling Green, Nashville, Birmingham, Montgomery, Mobile, Pascagoula, Gulfport, Biloxi, and New Orleans.

Official highway maps of the States involved herein indicate numerous combinations of Federal highways including several segments of the interstate system between New Orleans and Cincinnati and the principal intermediate points served by the trains.

Financial data.—The carrier's balance sheet as of March 31, 1968, shows assets of $1,003 million, including current assets of $97.4 million, special funds $4.3 million, investments $34.8 million, total properties less reserves for depreciation and amortization $857.3 million, and other assets and deferred charges $9.1 million. Liabilities were: Current $53.6 million; long-term debt, due within 1 year, $27.7 million; long-term debt, due after 1 year, $407.8 million; reserves $5.8 million; other liabilities and deferred credits $16.6 million; capital stock $123.9 million; capital surplus $22.1 million; and retained income unappropriated $345.4 million. L&N's income statements for the years 1966, 1967, and the first 3 months of 1968, show, respectively, railway operating revenues of $292.2 million, $285.3 million, and $73.5 million; net railway operating income $38.2 million, $31.4 million, and $6.6 million; net income after fixed charges and other deductions $28.5 million, $19.9 million, and $4.9 million.

The carrier's exhibits and testimony, as revised, depicting revenues, expenses, and out-of-pocket losses pertaining to the operation of the trains indicate net losses in 1966, 1967, and the first 4 months of 1968, of $9,318, $505,361, and $309,461, respectively. The estimated net loss for 1968, based on the month of April 1968, is $909,667. Net annual savings to the carrier, systemwise, upon discontinuance of the trains, are estimated to be $1,610,473. Appendix C reflects the actual revenues and expenses for the year 1967 and the first 4 months of 1968 in the first and second columns. The third column reflects the revenues and expenses for the year 1968 based upon the operating results for the month of April 1968. Column four reflects an estimate of the revenues that would be retained on other L&N trains and the added expenses of handling the traffic on other trains. Column five is an estimate of revenues that would be lost and the expenses to be saved by handling the traffic on other trains should the discontinuance of trains Nos. 6 and 7 be approved.

The revenues and costs, as set forth in appendix C, were computed by the carrier in accordance with generally accepted methods previously approved by the Commission as appropriate in train discontinuance cases and are not under dispute.

The operating expenses for 1966, 1967, the first 4 months of 1968, and the projection for the year 1968 were shown on an out-of-pocket basis. Wages of traincrews and enginecrews are the actual wages paid the crews, increased for the appropriate payroll taxes, meals, lodging, vacation, holiday, and health and welfare allowances. Locomotive fuel, water, lubricants and other supplies, locomotive depreciation, and personal injury and livestock damage, are on system averages with appropriate allocations to these trains according to the actual units involved. Dining expenses is the actual cost incurred and pullman deficits are the amounts billed by the Pullman Company.

Locomotive repairs and enginehouse expenses are based on system average unit costs applied to the number of units involved in these trains, decreased by 21 percent for overhead costs which include such items as labor costs and maintenance of facilities which would remain constant even though trains Nos. 6 and 7 were discontinued.

Car repairs and train supplies and expenses are similarly determined and subjected to a 21-percent decrease for overhead costs and elimination of the costs for deadhead cars on trains Nos. 6 and 7. Car depreciation and cost for rental of passenger cars were adjusted to eliminate deadhead equipment.

The joint terminal expenses shown to be avoidable as a result of the discontinuance were computed in the manner approved by the Commission in *Chicago, R. I. & P. R. Co. Discontinuance of Trains,* 328 I.C.C. 278, 286. They include only the amount by which the carrier's share of the total expenses would be diminished by virtue of its lesser use of

the terminals. The costs shown as savable do not include amounts attributable to deadhead equipment carried on trains Nos. 6 and 7 in and out of the terminals.

Evidence in opposition.—Thirty-nine public witnesses appeared at hearings in opposition to the discontinuance of the trains of whom 6 appeared at New Orleans, 9 at Montgomery, 16 at Birmingham, 6 at Nashville, and 2 at Louisville. No public witnesses appeared at Mobile or Cincinnati.

Among those expressing opposition were representatives of United States Congressmen, a representative of the Governor of Alabama, a State legislator, members and representatives of the Public Service Commission of Louisiana, Mississippi, Alabama, and Tennessee, a member of the Kentucky Railroad Commission, mayors, city and county officials, a representative of a college, a mortician, carrier employees, a pullman porter, and members of the public. Of the total witnesses, 14 were past and prospective patrons of the trains.

Public officials opposed the discontinuance of the trains on the stated ground that the economy and the industrial growth in the area is dependent upon continued service by all means of transportation, and particularly rail passenger service. They were also concerned with the general disapperance of passenger trains through discontinuances and the likelihood that all rail passenger service may become extinct. They, regular passengers, and others contend that alternate transportation services are not adequate.

Generally the passenger witnesses testified that at times there were equipment failures, that on time performances were poor, that overcrowding, particularly on weekends and holidays, had occurred, and that the employees were not as courteous as those of other common carriers. Criticism was also directed to a lack of advertising by the car-

rier. On the other hand, several of the patrons praised the carrier as being first class as compared with other railroads. All of such witnesses were desirous of having the trains for their future use and most preferred rail transportation to bus travel and some indicated their fear of air travel.

Discussion and Conclusions

Among factors to be considered in proceedings under section 13a(1) of the act to ascertain whether operation of the passenger trains is required for the public convenience and necessity and will not unduly burden interstate commerce are the population served, the effect on the communities on their route, the extent of the use made by the public of the service sought to be discontinued, alternate transportation service available in the area, the costs incurred and financial losses sustained by the carrier in providing the service under consideration, and the carrier's financial condition. No one of such factors by itself is conclusive or controlling. The burden imposed upon the carrier and upon interstate commerce must be weighed against the need for the service. It is possible that the need for the service under certain circumstances may be so great as to warrant its continuation even at a loss to the carrier. This could arise where the loss of the service would inflict serious injury on the communities, while continuance of the service would impose a relatively slight financial burden on the carrier. The facts in this proceeding do not disclose such an overriding need for the continuance of the involved trains.

L&N began incurring substantial losses on these trains in 1967 ($505,361) even with mail revenues of over $1 million, express revenues over $300,000, and additional revenues from passengers interlined at Evansville, Ind., with Chicago & Eastern Illinois Railroad Co. (C&EI) trains Nos. 93 and 54 and connecting with L&N's trains Nos. 6 and 7 at

Nashville, via intermediate L&N trains Nos. 5 and 10. The C&EI trains were discontinued February 1, 1968, *Chicago & E.I.R. Co. Discontinuance—Chicago & Evansville*, 331 I.C.C. 447.

If the carrier were required to operate the subject trains for another year, it would suffer out-of-pocket losses in excess of $900,000 (computed on the basis of 1968 costs and revenues). Nothing in the record indicates that the deficit could be abated in future years. In addition to the loss of connecting passengers, railway postoffice cars have been eliminated, reducing mail revenues, and on April 1, 1968, railway express (from one to four cars daily) was diverted to truck over the highway.

The full burden of the trains can be better visualized by considering the total economies attainable upon their discontinuance. As shown in appendix C, by retaining a portion of their traffic through diversion to other L&N trains (estimated to produce revenues of $939,500) and incurring thereon costs estimated at $238,700, the carrier could avoid more than $2.3 million of its present costs and thus effect economies in the range of $1.6 million per year. This brings us face to face with the question of whether the public's need for these trains is so great that the nation's private enterprise carrier system must be required to provide for it at an annual out-of-pocket deficit exceeding $900,000 while foregoing the opportunity to effect economies of more than $1.6 million per year.

Before discussing this issue, we turn to a preliminary matter, raised in the briefs filed by the city of Chicago, Ill., and the metropolitan government of Nashville and Davidson County, Tenn., dealing with the decision in *Chicago & E.I.R. Co. Discontinuance—Chicago & Evansville, supra.* These litigants and others have instituted an action in the United States District Court for the Northern District of Illinois, entitled City of Chicago, et al. v United

States, et al., to set aside the said decision of the Commission. The parties here ask that we request L&N to continue the operation of trains Nos. 6 and 7 voluntarily, pending full judicial review of the *C&EI* decision, and, in the event of a refusal by L&N, that we seek a temporary restraining order prohibiting the discontinuance of the trains pending full judicial review.

It is clear that pursuant to the provisions of section 13a(1) of the act, once having entered upon an investigation, we must make the statutory findings needed either to sustain a discontinuance of the investigation, or to support an order requiring continuance of the service within the time limit prescribed by section 13a(1). The evidence before us clearly establishes that the operation of these trains is not required by public convenience and necessity, that the continued operation thereof will unduly burden interstate commerce, and that the investigation should be discontinued; and we so find. Under these circumstances we have no lawful basis for ordering a continuance to await (perhaps longer than a year) developments which, in the end, might or might not change the picture.

The people who have been using the trains for travel have done so largely on an occasional or standby basis. Their primary means of conveyance are the automobile and other nonrail modes. The testimony of the governmental leaders, business representatives, and others is clear proof of that. Many gave opinions about a need for rail passenger service in the interest of community and commercial growth, but few hard, realistic facts were advanced by them in support. On the other hand, the carrier's director of industrial development testified that of 1,726 new industries located on L&N lines in the past 8 years, 843 were at points that had no rail passenger service.

He specified the factors that industry in general considers in selecting a new site—mainly, availability of such things as labor, lower wage rates, lower taxes, utilities

freight transportation (rail, truck, air and water) economical freight rates, access to raw materials, and cultural facilities—but availability of rail passenger service was not among them. He knew of not a single instance where rail passenger service was even mentioned. This testimony stands uncontroverted by the factual evidence of record.

Even for the individual traveler who calls upon the L&N for his occasional trip, the demand for the service of these trains is minimal. As shown in appendix B, an average of but 2.4 persons per day use train No. 6 for through service from New Orleans to Cincinnati, and only 2 per day use train No. 7 for the through run in the opposite direction. The same is true for the usage to and from the intermediate points: for example, from Mobile, a city of a quarter million, to Birmingham (population 325,000) there are only 4 passengers per day, and to Nashville (population 250,000), only 4 per day.

Local traffic between points on the 490-mile segment between Louisville and Montgomery constitutes a third of the total number of passengers—about 50 of the approximately 150 daily average who board and deboard at the various points along the 927-mile route. This area, which includes Nashville, will continue to have daily service by trains Nos. 8 and 9, the Pan American, and ever-other-day service by trains Nos. 15 and 16, the South Wind. The Pan American will also be available for through passengers and for service at all points on the Hummingbird schedule. Also available are the six daily through schedules each way by bus serving practically all the points on the line, numerous bus runs on segments of the line and airline services heretofore described. From this record we conclude that these alternate services are reasonably adequate to meet the public need for common carrier transportation services. In the face of this conclusion, notwithstanding that some inconvenience to travelers may be encountered at times, we cannot overlook nor disregard the enormous

and ever increasing losses to the carrier. This is plainly a case where there are too many trains for the diminishing needs of the public on this line. With former sources of traffic and revenue unalaterably foreclosed while costs continue their upward spiral, the carrier cannot be expected to continue running a train upward of 1,000 miles each day for service along the way to about 150 persons—many of whom travel only short distances [1]—while subsidizing their travel at the rate of $14.50 out-of-pocket per passenger.

Shippers of express will have adequate service remaining by over-the-highway truck transportation, and by L&N trains Nos. 8 and 9. Buses operating over the highway also render express service. The Post Office Department will continue the mails, including parcel post, to all points by use of airplanes, trucks, and the L&N trains Nos. 8 and 9.

Considering, among other things, the sparing use now made of these long-line trains—not only by travelers, but also by the Post Office Department and shippers of express—the abundance of alternate transportation by rail and other modes and the magnitude of the financial burden which the carrier would have to bear if the trains were continued, this is precisely the kind of circumstance for which Congress designed the relief of section 13a(1). Efforts have been made to have the law amended, including recommentations to Congress by this Commission, to provide a statutory plan for solutions to the passenger train problem under modified criteria. However meritorious Congress may find those efforts to be, they cannot be embraced as elements for decision of the matter now before us. As an administrative agency we are bound by the law as it stands and must be governed by the intendment of Congress in its enactment.

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[1] For example, of the 1,763 boarding at Pascagoula during the 6 months covered by appendix B, 1,497 deboarded at Mobile, 40 miles away.

Employee representatives have requested that appropriate conditions be imposed for protection of employees who may be affected by the discontinuance. It is well established that we have no authority to impose employee protective conditions in a section 13a discontinuance case. The adverse effect of a discontinuance upon employees is a factor to be considered in evaluating public convenience and necessity. Having weighed such factor, we conclude that any possible adverse effect upon the carrier's employees, when considered with all other facts discussed herein, does not justify the findings we would have to make before we could lawfully order continued operation of the involved trains.

Contentions of the parties as to fact or law not specifically discussed herein have been considered and found to be without material significance or not justified.

We find that the operation by the Louisville and Nashville Railroad Company of passenger trains Nos. 6 and 7 between New Orleans, La., and Cincinnati, Ohio, is not required by the public convenience and necessity and that continued operation thereof would unduly burden interstate commerce.

An appropriate order will be entered discontinuing the investigation herein.

COMMISSIONER BUSH concurs in the result.

APPENDIX A

No. 6 Daily (Read down)	Miles		No. 7 Daily (Read up)	Population 1960
8:15 a.m.	0	Lv. New Orleans, La ---- Ar.	8:10 p.m.	665,000
8:20 a.m.	----	Lv. Carrollton Avenue ---- Lv.	7:50 p.m.	-------
--------	36	Lv. Rigolets ---- Lv.	--------	-------
--------	53	Lv. Waveland, Miss ---- Lv.	--------	1,108
9:29 a.m.	57	Lv. Bay St. Louis ---- Lv.	6:25 p.m.	5,073
9:51 a.m.	72	Lv. Gulfport ---- Lv.	6:00 p.m.	33,000
---------	79	Lv. Edgewater Park ---- Lv.	5:48 p.m.	750
10:07 a.m.	85	Lv. Biloxi ---- Lv.	5:40 p.m.	47,000
10:31 a.m.	105	Lv. Pascagoula ---- Lv.	5:10 p.m.	20,800
11:35 a.m.	----	Ar. Mobile, Ala ---- Lv.	4:15 p.m.	220,000
11:40 a.m.	145	Lv Mobile, Ala ---- Ar.	3:50 p.m.	-------
---------	169	Bay Minette ---- Lv.	3:05 p.m.	5,197
12:55 p.m.	----	Ar. Flomaton ---- Lv.	2:20 p.m.	1,454
1:00 p.m.	205	Lv. Flomaton ---- Ar.	2:20 p.m.	-------
---------	218	Brewton ---- Lv.	1:53 p.m.	6,309
---------	243	Evergreen ---- Lv.	1:28 p.m.	3,703
2:39 p.m.	279	Greenville ---- Lv.	12:53 p.m.	6,894
3:40 p.m.	----	Ar. Montgomery ---- Lv.	12:05 p.m.	146,000
4:10 p.m.	323	Lv. Montgomery ---- Ar.	10:30 a.m.	-------
6:10 p.m.	----	Ar. Birmingham ---- Lv.	8:15 a.m.	325,000
6:25 p.m.	421	Lv. Birmingham ---- Ar.	7:45 a.m.	-------
---------	473	Lv. Cullman, Ala ---- Lv.	---------	11,900
8:15 p.m.	506	Lv. Decatur ---- Lv.	5:59 a.m.	33,800
10:50 p.m.	----	Ar. Nashville, Tenn ---- Lv.	3:30 a.m.	250,887
11:35 p.m.	626	Lv. Nashville, Tenn ---- Ar.	2:25 a.m.	-------
1:00 a.m.	----	Ar. Bowling Green, Ky ---- Lv.	12:45 a.m.	32,800
1:20 a.m.	699	Lv. Bowling Green Ky ---- Ar.	12:20 a.m.	-------
2:30 a.m.	771	Lv. Elizabethtown ---- Lv.	11:06 p.m.	10,900
4:35 a.m.	----	Ar. Louisville ---- Lv.	11:10 p.m.	392,000
5:00 a.m.	813	Lv. Louisville ---- Ar.	10:45 p.m.	-------
7:40 a.m	922	Lv. Latonia (Covington) ---- Lv.	7:58 p.m.	57,000
8:10 a.m.	927	Ar. Cincinnati, Ohio ---- Lv.	7:40 p.m.	495,300

APPENDIX B

Louisville and Nashville Railroad Company, passengers handled on L&N Train No. 6 for 6 months period, November 1, 1967 to April 30, 1968

From	On	D/A*	Off	D/A*	To Bay St. Louis	Gulfport	Biloxi	Pascagoula	Mobile	Flomaton	Flomaton (L&N byd)	Greenville	Montgomery	Montgomery (OC)	Birmingham	Birmingham (OC)	Cullman	Decatur	Decatur (OC)	Nashville	Nashville (L&N byd)	Bowling Green	Elizabethtown	Louisville	Louisville (OC)	Latonia	Cincinnati	Cincinnati (OC)
New Orleans, La--------	1,404	18.7	------	------	345	282	395	171	909	56	12	33	254	--	143	---	6	37	--	236	60	10	4	69	---	---	24	139
New Orleans (OC)-------	889	4.9	------	------	4	52	89	16	175	25	58	4	95	35	57	6	1	24	5	38	12	3	3	131	2	---	19	37
Carrollton Avenue------	-----	-----	-----	-----	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---
Bay St. Louis, Miss----	275	1.5	349	1.9	---	188	5	4	20	---	---	---	19	--	11	2	---	1	--	1	12	---	---	---	---	---	4	7
Gulfport, Miss----------	758	4.2	522	2.9	---	---	229	122	51	1	---	7	36	--	41	31	3	21	--	19	92	1	---	11	---	---	33	60
Biloxi, Miss------------	1,081	5.9	718	3.9	---	---	---	459	114	2	---	2	83	--	52	46	---	13	--	20	124	---	---	21	---	3	37	105
Pascagoula, Miss--------	1,763	9.7	772	4.2	---	---	---	---	1,497	10	---	12	31	--	44	25	---	12	--	10	75	---	---	6	1	---	17	23
Mobile, Ala-------------	2,778	15.2	2,764	15.1	---	---	---	---	-----	88	7	63	473	1	402	262	30	150	4	71	710	2	2	66	1	---	123	343
Flomaton, Ala-----------	1,033	5.7	162	0.9	---	---	---	---	-----	---	---	25	86	--	144	77	14	39	--	59	290	3	8	33	3	---	97	155
Flomaton (L&N byd)------	919	5.0	77	0.4	---	---	---	---	-----	---	---	3	41	2	119	112	7	14	3	104	239	1	1	26	---	---	49	98
Greenville, Ala---------	142	2.4	149	0.8	---	---	---	---	-----	---	---	---	57	1	125	18	---	16	--	11	64	---	---	12	---	---	43	95
Montgomery, Ala---------	4,329	23.8	1,175	6.5	---	---	---	---	-----	---	---	---	---	--	1,086	280	48	194	3	254	1,303	7	4	143	---	---	366	641
Montgomery (OC)---------	90	0.5	39	0.2	---	---	---	---	-----	---	---	---	---	---	12	---	---	1	--	5	36	---	---	5	1	---	16	14
Birmingham, Ala---------	4,519	24.8	2,236	12.3	---	---	---	---	-----	---	---	---	---	---	---	---	148	166	--	591	1,682	22	22	256	4	1	587	1,040
Birmingham, (OC)--------	168	0.9	859	4.7	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	27	26	---	---	6	---	---	21	88
Cullman, Ala------------	309	1.7	257	1.4	---	---	---	---	-----	---	---	---	---	---	---	---	---	5	--	14	219	---	---	15	---	2	23	31
Decatur, Ala------------	1,594	8.8	693	3.8	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	102	968	1	11	161	---	2	134	215
Decatur (OC)------------	-----	-----	15	0.1	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	---	-----	---	---	-----	---	---	-----	-----
Nashville, Tenn---------	863	4.7	1,562	8.6	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	37	7	206	7	4	223	379
Nashville,Tenn (L&N byd)	656	3.6	5,912	32.5	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	19	7	328	---	---	148	154
Bowling Green, Ky-------	266	1.5	106	0.6	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	---	3	177	2	1	42	41
Bowling Green,(L&N byd)	1,143	6.3	-----	-----	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	---	8	494	1	9	293	338
Elizabethtown, Ky-------	5	0.1	80	0.4	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	---	---	2	---	---	---	3
Louisville, Ky----------	674	3.7	2,168	11.9	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	---	---	-----	---	8	293	373
Louisville (OC)---------	-----	-----	22	0.1	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	---	---	-----	---	---	-----	-----
Latonia, Ky-------------	-----	-----	31	0.2	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	---	---	-----	---	---	-----	-----
Cincinnati, Ohio--------	-----	-----	2,811	15.4	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	---	---	-----	---	---	-----	-----
Cincinnati (OC)---------	-----	-----	4,479	24.6	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	---	---	-----	---	---	-----	-----
Total-------------------	27,958	153.6	27,958	153.6	349	522	718	772	2,764	162	77	149	1,175	39	2,236	859	257	693	15	1,562	5,912	106	80	2,168	22	31	2,811	4,479

*D/A daily average.

Louisville and Nashville Railroad Company, passengers handled on Train No. 7 for 6 months period, November 1, 1967 through April 30, 1968

From	To On	D/A*	Off	D/A*	Louisville	Louisville (OC)	Elizabethtown	Bowling Green	Bowling Green (L&N byd)	Nashville	Nashville (L&N byd)	Decatur	Decatur (OC)	Cullman	Birmingham	Birmingham (OC)
Cincinnati, Ohio	2,301	15.3	-----	-----	383	--	5	120	366	300	129	104	-	28	498	89
Cincinnati (OC)	3,960	21.8	-----	-----	482	2	3	45	310	285	235	175	2	36	848	81
Latonia, Ky.	36	0.2	-----	-----	14	12	1	3	1	---	---	2	-	2	1	---
Louisville, Ky.	3,531	19.4	879	4.8	---	--	16	1,334	516	195	413	136	1	4	333	68
Louisville (OC)	101	0.6	14	0.1	---	--	--	1	2	10	7	---	-	---	4	---
Elizabethtown, Ky.	73	0.4	23	0.1	---	--	--	26	8	7	12	2	-	---	6	4
Bowling Green, Ky	117	0.6	1,529	8.4	---	--	--	-----	---	19	40	5	-	1	7	7
Bowling Green (L&N byd)	-----	-----	1,203	6.6	---	--	--	-----	---	--	---	---	-	---	---	---
Nashville, Tenn	464	2.5	816	4.5	---	--	--	-----	---	--	---	26	-	2	142	14
Nashville (L&N byd)	329	1.8	1,179	6.5	---	--	--	-----	---	--	---	727	1	138	1,661	144
Decatur, Ala.	329	1.8	1,179	6.5	---	--	--	-----	---	--	---	---	-	3	51	10
Decatur (OC)	13	0.1	4	0.1	---	--	--	-----	---	--	---	---	-	---	2	4
Cullman, Ala.	49	0.3	214	1.2	---	--	--	-----	---	--	---	---	-	---	7	---
Birmingham, Ala.	1,550	8.6	3,560	19.6	---	--	--	-----	---	--	---	---	-	---	-----	---
Birmingham (OC)	239	1.3	421	2.3	---	--	--	-----	---	--	---	---	-	---	-----	---
Montgomery, Ala.	1,364	7.5	3,601	19.8	---	--	--	-----	---	--	---	---	-	---	-----	---
Montgomery (OC)	3,557	19.5	50	0.3	---	--	--	-----	---	--	---	---	-	---	-----	---
Greenville, Ala.	112	0.6	550	3.0	---	--	--	-----	---	--	---	---	-	---	-----	---
Evergreen, Ala.	12	0.1	117	0.6	---	--	--	-----	---	--	---	---	-	---	-----	---
Brewton, Ala.	100	0.5	142	0.7	---	--	--	-----	---	--	---	---	-	---	-----	---
Flomaton, Ala.	118	0.6	1,044	5.7	---	--	--	-----	---	--	---	---	-	---	-----	---
Flomaton (L&N byd)	81	0.4	777	4.3	---	--	--	-----	---	--	---	---	-	---	-----	---
Bay Minette, Ala.	2	0.1	69	0.4	---	--	--	-----	---	--	---	---	-	---	-----	---
Mobile, Ala.	1,548	8.5	3,117	17.1	---	--	--	-----	---	--	---	---	-	---	-----	---
Pascagoula, Miss.	359	2.0	375	2.1	---	--	--	-----	---	--	---	---	-	---	-----	---
Biloxi, Miss.	534	2.9	785	4.3	---	--	--	-----	---	--	---	---	-	---	-----	---
Edgewater Park, Miss.	-----	----	7	0.1	---	--	--	-----	---	--	---	---	-	---	-----	---
Gulfport, Miss.	435	2.4	641	3.5	---	--	--	-----	---	--	---	---	-	---	-----	---
Bay St. Louis, Miss.	321	1.8	166	0.9	---	--	--	-----	---	--	---	---	-	---	-----	---
Waveland, Miss.	24	0.1	-----	-----	---	--	--	-----	---	--	---	---	-	---	-----	---
Carrollton Avenue	-----	----	4,445	24.4	---	--	--	-----	---	--	---	---	-	---	-----	---
New Orleans, La.	-----	----	944	5.2	---	--	--	-----	---	--	---	---	-	---	-----	---
New Orleans (OC)	-----	----	-----	-----	---	--	--	-----	---	--	---	---	-	---	-----	---
Total	27,508	151.1	27,508	151.1	979	14	23	1,529	1,203	816	836	1,179	4	214	3,560	471

*D/A daily average

Louisville and Nashville Railroad Company, passengers handled on Train No. 7 for 6 months period, November 1, 1967 through April 30, 1968--Continued

From \ To	Montgomery	Montgomery (OC)	Greenville	Evergreen	Brewton	Flomaton	Flomaton (L&N byd)	Bay Minette	Mobile	Pascagoula	Biloxi	Edgewater Park	Gulfport	Bay St. Louis	Waveland	Carrollton Ave.	New Orleans	New Orleans (OC)
Cincinnati, Ohio	525	3	30	9	15	64	35	3	125	16	29	-	22	5	-	-	196	5
Cincinnati (OC)	514	10	81	17	10	117	100	8	286	11	77	-	46	6	-	-	144	29
Latonia, Ky	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---
Louisville, Ky	228	4	3	--	5	33	14	-	64	13	22	-	12	3	-	-	97	20
Louisville (OC)	4	2	--	--	--	2	3	-	3	--	1	-	--	-	-	-	1	61
Elizabethtown, Ky	2	---	---	--	--	1	2	-	1	--	--	-	--	-	-	-	2	--
Bowling Green, Ky	15	---	---	--	--	2	2	-	5	--	1	-	2	-	-	-	9	2
Bowling Green (L&N byd)	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---
Nashville, Tenn	116	2	5	1	1	39	16	2	41	2	9	-	7	-	-	-	24	15
Nashville (L&N byd)	1,379	28	38	21	22	237	209	3	601	69	107	1	97	9	-	-	67	10
Decatur, Ala	94	-	10	7	3	33	7	1	62	14	6	-	10	-	-	-	15	3
Decatur (OC)	2	---	---	--	--	---	1	-	3	--	1	-	--	-	-	-	--	--
Cullman, Ala	25	---	---	--	2	3	---	-	7	1	--	-	2	1	-	-	1	--
Birmingham, Ala	802	---	96	13	4	97	53	11	273	21	38	-	23	4	-	-	112	12
Birmingham (OC)	95	4	11	--	--	18	11	-	62	7	16	-	6	-	-	-	2	7
Montgomery, Ala	---	---	228	8	19	55	45	1	498	30	88	2	53	8	-	-	288	41
Montgomery (OC)	---	---	48	41	61	245	277	32	996	82	255	-	265	40	-	-	875	340
Greenville, Ala	---	---	---	--	--	4	2	-	48	5	3	-	5	-	-	-	36	9
Evergreen, Ala	---	---	---	--	--	1	---	-	--	--	1	-	--	-	-	-	10	--
Brewton, Ala	---	---	---	--	--	93	---	-	2	2	-	-	--	-	-	-	3	--
Flomaton, Ala	---	---	---	--	--	---	---	5	35	6	3	-	6	-	-	-	40	23
Flomaton (L&N byd)	---	---	---	--	--	---	---	3	5	-	4	-	3	-	-	-	27	39
Bay Minette, Ala	---	---	---	--	--	---	---	-	--	--	--	-	--	-	-	-	2	--
Mobile, Ala	---	---	---	--	--	---	---	-	--	96	80	4	47	33	-	-	1,145	143
Pascagoula, Miss	---	---	---	--	--	---	---	-	--	--	45	-	15	7	-	-	261	31
Biloxi, Miss	---	---	---	--	--	---	---	-	--	--	--	-	20	10	-	-	429	75
Edgewater Park, Miss	---	---	---	--	--	---	---	-	--	--	--	-	--	-	-	-	--	--
Gulfport, Miss	---	---	---	--	--	---	---	-	--	--	--	-	--	42	-	-	337	56
Bay St. Louis, Miss	---	---	---	--	--	---	---	-	--	--	--	-	--	--	-	-	317	4
Waveland, Miss	---	---	---	--	--	---	---	-	--	--	--	-	--	--	-	-	5	19
Carrollton Avenue	---	---	---	--	--	---	---	-	--	--	--	-	--	--	-	-	--	--
New Orleans, La	---	---	---	--	--	---	---	-	--	--	--	-	--	--	-	-	--	--
New Orleans (OC)	---	---	---	--	--	---	---	-	--	--	--	-	--	--	-	-	--	--
Total	3,601	50	550	117	142	1,044	777	69	3,117	375	785	7	841	166	-	-	4,445	944

APPENDIX C

	Year 1967 trains Nos. 6 and 7	First four months 1968 trains Nos. 6 and 7	Annual projection from actual results of April 1968 trains Nos. 6 and 7	Projected year 1968: Estimated revenues retained, expenses not saved from discontinuance of trains Nos. 6 and 7	Projected year 1968: Estimated revenues loss and expenses saved
Revenues:					
1. Passenger	$1,331,486	$246,925	$740,296	$399,037	$341,259
2. Dining	146,084	28,830	68,518	22,611	45,907
3. U. S. Mail	1,040,985	244,600	753,176	514,912	238,264
4. Express	309,519	52,608			
5. Baggage	2,525	1,784	5,817	2,909	2,908
6. Total	2,830,599	574,747	1,567,807	939,469	628,338
Expenses (out-of-pocket):					
7. Wages of train and enginecrews	721,702	229,576	652,530		652,530
8. Locomotive repairs	292,629	91,681	271,699		271,699
9. Locomotive fuel	258,266	80,914	239,785		239,785
10. Locomotive water, lubricants, and other supplies	35,168	11,018	32,652		32,652
11. Locomotive enginehouse expense	54,942	17,214	51,022		51,022
12. Locomotive depreciation	46,008	15,336	46,660		46,660
13. Car repairs	344,155	78,662	209,553	79,063	130,490
14. Car depreciation	23,966	5,268	15,042	8,476	6,566
15. Rent for passenger cars	171,884	26,769	45,565		45,565
16. Train supplies and expenses	278,192	58,296	143,685	42,407	101,278
17. Personal injury and livestock damage	86,526	28,684	86,554		86,554
18. Dining expenses	372,318	86,031	247,379	11,708	235,671
19. Pullman deficit	313,119	62,800	156,628		156,628
20. Cincinnati joint terminal expenses	328,134	89,898	255,618	64,604	191,014
21. Louisville joint terminal expenses	19,960				
22. Decatur joint terminal expenses	9,774	2,178	7,363	6,648	715
23. Montgomery joint terminal expenses	30,704	8,704	31,034	17,011	14,023
24. New Orleans joint terminal expenses	92,559	25,115	68,286	8,746	59,540
25. Total	3,480,006	918,144	2,561,055	238,663	2,322,392
26. Net out-of-pocket (Loss) gain	(649,407)	(343,397)	(993,248)		
27. Gain from feeder services	144,046	33,936	83,581		
28. Net out-of-pocket (Loss) after feeder gain	(505,361)	(309,461)	(909,667)		

Expenses—annual projection	2,322,392
Revenues—annual projection	628,338
Savings to L&N Railroad Company	1,694,054
Less projected feeder revenue gain	83,581
Net annual savings to L&N	1,610,473

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 3rd day of September, 1968.

Finance Docket No. 25047

LOUISVILLE AND NASHVILLE RAILROAD COMPANY DISCONTINUANCE OF TRAINS NOS. 6 AND 7 BETWEEN NEW ORLEANS, LA., AND CINCINNATI, OHIO

Investigation of the matters and things involved in this proceeding having been made pursuant to the order of said division, dated April 24, 1968, a hearing having been held and the said division on the date hereof having made and filed a report containing its findings of fact and conclusions thereon which report is hereby referred to and made a part hereof:

It is ordered, That this investigation be, and it is hereby, discontinued effective 35 days from the date of service of this order.

By the Commission, division 3.

H. NEIL GARSON,
Secretary.

(SEAL)

Service Date
November 4, 1968

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 31st day of October 1968.

Finance Docket No. 25047

LOUISVILLE AND NASHVILLE RAILROAD COMPANY DISCONTINUANCE OF TRAINS NOS. 6 AND 7 BETWEEN NEW ORLEANS, LA., AND CINCINNATI, OHIO

Upon consideration of the record in the above-entitled proceedings, the petition of Metropolitan Government of Nashville and Davidson County, Tenn., Tennessee Public Service Commission, Alabama Public Service Commission, State of Louisiana and the Cities of Chicago, Ill. and Birmingham and Montgomery, Ala., filed October 7, 1968, seeking reconsideration of the order of Division 3, served September 6, 1968; and the reply of the Louisville and Nashville Railroad Company filed October 9, 1968; and

It appearing, That the petition sets forth no material facts or arguments in addition to those previously considered in the proceeding; that there has been presented no error of fact or law with respect to matters complained of by petitioners; and that no showing has been made warranting reconsideration of said order;

It is ordered, That the petition for reconsideration be, and it is hereby denied.

By the Commission, Division 3, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

(SEAL)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITY OF CHICAGO, THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, VILLAGE OF MILFORD, CITY OF WATSEKA, CITY OF HOOPESTON, CITY OF DANVILLE, CITY OF TERRE HAUTE, CITY OF VINCENNES and MAURICE F. RADRIZZI,

Plaintiffs,

v. No. 68 C 956

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,

Defendants.

COMPLAINT

I.

Plaintiffs are communities and an official of a labor organization that attack various findings, decisions and orders of the Interstate Commerce Commission ("Commission"), entered under sections 5(2) and 13a(1) of the Interstate Commerce Act, 49 U.S.C. sections 5(2) and 13a(1), as follows:

(1) *Evansville Line:* Plaintiffs City of Chicago, Village of Milford, City of Watseka, City of Hoopeston, City of Danville, City of Terre Haute and City of Vincennes, are communities located on the so-called Evansville line of the Chicago & Eastern Illinois Railroad Company ("Eastern"), which line extends approximately 287 miles between Chicago, Ill. and Evansville, Ind.

(2) *South of Evansville:* Plaintiff The Metropolitan Government of Nashville and Davidson County Tennessee is a community located in the State of Tennessee situated on

the line of the Louisville and Nashville Railroad Company ("L&N"), which line extends approximately 159 miles between Evansville, Ind. and Nashville, Tenn.

(3) *Labor Organization:* Plaintiff Maurice F. Radrizzi is an official of the Brotherhood of Railroad Trainmen, the latter being the collective bargaining agent for certain employees operating joint Eastern-L&N passenger trains involved in this action between Chicago, Ill. and Atlanta, Ga.

II.

A. The plaintiffs listed in (1) and (3), above, (Evansville Line and Labor Organization), were parties to proceedings before the Interstate Commerce Commission known as Finance Docket No. 24725, *Chicago & Eastern Illinois Railroad Co.—Discontinuance of Trains Nos. 93 and 54 Between Chicago, Ill., and Evansville, Ind.*, reported at 331 I.C.C. 447, and attached hereto as Appendix 1. Findings and order were entered January 25 and served January 31, 1968, which found that the operation by Eastern of passenger trains 93 (southbound) and 54 (northbound) between Chicago, Ill. and Evansville, Ind. is not required by public convenience and necessity, and that continued operation thereof would unduly burden interstate or foreign commerce. The discontinuance became effective February 2, 1968. The discontinued portion was the service of joint Eastern-L&N trains 93 and 54 between Chicago, Ill. and Evansville, Ind. The trains now operate solely between Evansville, Ind. and Atlanta, Ga., with connections at Nashville, Tenn. for trains 6 and 7 between Nashville, Tenn. and Montgomery and Mobile, Ala. and New Orleans, La.

A number of the communities in (1), above, (Evansville Line), were parties in support of the acquisition of the Evansville Line by L&N in Finance Docket No. 21755, *Missouri Pac. R. Co.—Control—Chicago & E.I.R. Co.*, decided February 16, 1965, and reported at 327 I.C.C. 279. (See: 327 I.C.C. at 302)

B. The plaintiff listed in (2), above, (South of Evansville), The Metropolitan Government of Nashville and Davidson County Tennessee was not a party to Finance Docket No. 24725, *Chicago & Eastern Illinois Railroad Co.–Discontinuance of Trains Nos. 93 and 54 Between Chicago, Ill. and Evansville, Ill.*, and hearings were not held at Nashville, Tenn., or at any point south of Evansville, Ill., even though an estimated 75 percent of the passengers utilizing trains 93 and 54 travel between points located north of Evansville, Ind., on the one hand, and points located south of Evansville, Ind., on the other hand. The discontinuance of Eastern's segment of these joint Eastern-L&N through trains has severed all passenger train service between points north of Evansville, Ind., on the one hand, and points south of Evansville, Ind., on the other hand. Plaintiff The Metropolitan Government of Nashville and Davidson County Tennessee was not given notice by the posting of notices of the proposed discontinuance at stations in the Nashville area, as required by section 13a(1) of the Act and the Commission's regulations thereunder, and the Governor of Tennessee was not served with notice as specifically required by the statute.

A representative letter by a citizen of Tennessee to the Interstate Commerce Commission, and the reply by the agency, are attached hereto as Appendix 2. A representative letter by a citizen of Georgia to the Interstate Commerce Commission, and the reply by the agency, are attached hereto as Appendix 3.

III.

This action is brought under, and the United States is made a defendant under, and the jurisdiction of this court is conferred by, Title 28 of the United States Code, Sections 1336(a), 1398(a), 2321-25, inclusive, and 2284; Interstate Commerce Act (49 U.S.C. Section 1 et seq., and particularly sections 5(2), 13a(1) and 17(9); the Fifth Amendment to the Constitution of the United States; and

the Administrative Procedure Act, 5 U.S.C. sections 702-4, inclusive.

IV.

The venue of this action is in this Court, pursuant to the provisions of 28 U.S.C. 1398(a), referred to above, because plaintiff City of Chicago, among other plaintiffs, is located within the jurisdiction of this Court.

V.

Defendant United States of America is a statutory defendant which is named as a party pursuant to 28 U.S.C. 2322.

Defendant Interstate Commerce Commission is an administrative agency, created by the Act to Regulate Commerce, Approved February 4, 1887, 24 Stat. 283, and amendments thereto, now known as the Interstate Commerce Act, with specifically vested powers and duties respecting transportation in interstate and foreign commerce.

Defendant Chicago & Eastern Illinois Railroad Company is a railroad corporation with multiple lines of railroad in the Northern District of Illinois, with its principal office in Cook County, and which is doing business in the Northern District of Illinois.

VI.

This action seeks to enjoin, annul, suspend and set aside the following orders of the Interstate Commerce Commission:

A. Finance Docket No. 21755, *Missouri Pac. R. Co.–Control–Chicago & E.I.R. Co.*, in part. That portion of the decision and order of February 16, 1965 which overruled the recommended order of the hearing examiner that Eastern under Missouri Pacific Railroad control could not alter its passenger train schedules in such manner so as to cause connecting service to be broken. (327 I.C.C. at 307-308, 385-86)

B. Finance Docket No. 24725, *Chicago & E.I.R. Co. Discontinuance of Trains Nos. 93 and 54 Between Chicago, Ill. and Evansville, Ind.* The decision, order and findings entered January 25, 1968 (served January 31, 1968), and the order denying reconsideration entered May 8, 1968 (served May 15, 1968, as corrected). The order and corrected order of May 8, 1968 are attached hereto as Appendix 4 and Appendix 5.

VII.

The findings, decisions and orders of the Commission, set forth in Paragraph VI, above, are erroneous, unsupported by substantial evidence, without rational basis, lack the necessary findings, and are violative of due process, on the following grounds, among others:

A. *Control of Eastern (F.D. 21755)*

(1) In failing to adopt the recommendation of its hearing examiner in F.D. 21755 that a specific condition be imposed which would require resort to the Commission for modification of the order in F.D. 21755 prior to revision of passenger service, rather than merely ousting the States of Illinois and Indiana of jurisdiction over interstate trains by the filing of notices pursuant to section 13a(1) of the Act, assuming, arguendo, that state jurisdiction was in fact ousted;

(2) in failing to require compliance with its order of February 7, 1967 requiring that L&N submit an application for acquisition of the Evansville Line on or before February 7, 1968, and thereupon failing to consider this violation sufficient cause for joinder of Missouri Pacific in the proceeding as requested by certain of the plaintiffs herein. (See: 331 I.C.C. at 449);

B. *Trains 93 & 54 (F.D. 24725)*

(1) In finding that Missouri Pacific control of Eastern would be consistent with the public interest if L&N were included in the transaction, the Commission gave great

weight and repeated emphasis to the preservation and improvement of the then-existing joint Eastern-L&N passenger train service between points on the Evansville Line, on the one hand, and points south of Evansville, Ind., on the other hand, yet the Commission now finds in F.D. 24725 that the operation of interstate passenger service by Eastern is not required over the Evansville Line, so that the findings in F.D. 24725 are contradictory and irrational. (Compare 327 I.C.C. at 294, 298, 301, 332, 338, 361-62, with the ultimate findings in 331 I.C.C. at 462);

(2) in finding that Eastern invoked federal jurisdiction, and superseded state jurisdiction, over the Chicago, Ill.–Atlanta, Ga. trains, merely by posting notices of the proposed discontinuance at stations served by Eastern in Illinois and Indiana, serving the Governors of Illinois and Indiana with the notice, posting notices on the train itself, and filing said notice with the Interstate Commerce Commission, because the statute requires that all stations served by the trains and all of the Governors of the involved states must be provided notice in order for federal jurisdiction to be invoked with respect to the train or any part of the train;

(3) in failing to dismiss the proceeding for failure of Eastern to serve notice of the proposed discontinuance upon the Governors of the States of Kentucky, Tennessee and Georgia, as required by section 13a(1) and the Commission's rules thereunder;

(4) in failing to dismiss the proceeding for failure of Eastern to file its notice and supporting statement with the regulatory bodies of the States of Kentucky, Tennessee and Georgia in accordance with 49 CFR 1122.5j;

(5) in failing to dismiss the proceeding for failure of Eastern to serve the Governor and state regulatory bodies of the States of Kentucky, Tennessee and Georgia with the order instituting the investigation, in accordance with 49 CFR 1100.246(d);

(6) in failing to dismiss the proceeding for failure of Eastern or L&N to post notices of the proposed discontinuance at stations south of Evansville, Ind. served by trains 93 and 54.

(7) in failing to dismiss the proceeding for failure of Eastern to specify in the notice the through-route nature of the trains south of Evansville;

(8) in finding, in essence, that Eastern's operation of trains 93 and 54 is a separate "train", apart from L&N's segment of trains 93 and 54, for the purposes of section 13a(1), whereas the train is advertised to the public as an entity, the equipment is in through pool service, both carriers employ the same train numbers for the train, and L&N has a financial interest in Eastern;

(9) in failing to render findings as to whether trains 93 and 54, for their entire runs between Chicago, Ill. and Atlanta, Ga., are required by public convenience and necessity and would unduly burden interstate or foreign commerce, as required by section 13a(1);

(10) in failing to make the requisite subsidiary findings as to the impact of the discontinuance of the segment of the trains north of Evansville, Ind. upon the viability of the segment of train service south of Evansville, Ind.;

(11) in failing to permit the intervention of the Tennessee Public Service Commission in the proceeding;

(12) in failing to provide a minimum of 30 days before which its order of January 25, 1968 would take effect discontinuing the investigation, in violation of section 15(2) of the Act;

(13) in prejudging petitions for reconsideration in reopening Finance Docket No. 24646, *Louisville & Nashville Railroad Co. Discontinuance of Trains Nos. 53 and 92 Between St. Louis, Mo. and Nashville, Tenn.*, on the specific ground that Eastern's segment of the trains had been discontinued, whereas under the Commission's rules the January 25, 1968 findings were only tentative and non-final, 49 CFR

1100.101(a)(2), the November 22, 1967 report being attached hereto as Appendix 6 (reported at 331 I.C.C. 203), and the March 12, 1968 order reopening the proceeding being attached hereto as Appendix 7;

(14) in prejudging petitions for reconsideration by the March 12, 1967 order reopening Finance Docket No. 24646, described in (13), above, when exceptions were due to be filed March 14, 1968 in Finance Docket No. 24726, *Chicago & Eastern Illinois Railroad Company Discontinuance of Trains Nos. 3 and 4 Between Chicago and Danville, Ill.*, in view of the fact that the record in F.D. 24725 and F.D. 24726 were consolidated, so that consideration of exceptions to the recommended report in F.D. 24726 must be made prior to acting upon petitions for reconsideration in F.D. 24725 to avoid inconsistent rulings on disputed evidence common to both proceedings;

(15) in prejudging petitions for reconsideration by advising persons that the findings and decision of January 25, 1968 were final, whereas the findings and decision were only tentative and subject to petitions for reconsideration by such persons, even though they resided south of Evansville, Ind., in marked contrast with the usual policy of the Commission to advise persons of their right to seek reconsideration, an example of this prejudgment being the letter of Commissioner Murphy to the Unique Knitting Company at Acworth, Ga., attached hereto as Appendix 3;

(16) in failing to join Missouri Pacific Railroad Company as a party to the proceeding as requested by several protestants;

(17) in failing to promptly issue a final order upon petitions for reconsideration when, in fact, the actual determination prejudging the petitions for reconsideration was made March 12, 1968 by Division 3, acting as an Appellate Division, in reopening F.D. 24646, and on the same date Eastern signed an agreement with L&N whereby the latter would acquire the Evansville Line, the latter having signed the agreement on March 8, 1968.

(18) in rendering findings based upon the availability of alternate service which were not supported by evidence relating to train travel between specific points on Eastern, on the one hand, and points on L&N, on the other hand;

(19) in rendering findings based upon a train schedule which was superseded by a new schedule at the time of the hearings, the schedule shown in the report not indicating service at Watseka and Hoopeston, Ill.;

(20) in rendering findings based upon an incorrect consist for the trains, the report omitting an express car on train 93 between Chicago, Ill. and Chattanooga, Tenn., as well as an express car on train 54 between Nashville, Tenn. and Chicago, Ill.;

(21) in failing to credit Eastern's segment of the trains with feeder value for revenue earned on L&N's segment of the trains, recognized as proper by L&N in its reply to the petition of City of Carmi (Illinois) in Finance Docket No. 24646;

(22) erroneously stated in its report that patrons of Eastern's trains could use Illinois Central Railroad Company passenger train service, because the latter railroad can hardly be expected to expand its service to accommodate Evansville Line passengers in view of the decision of this court on August 4, 1966 in *Illinois Central Railroad Company v. United States,* 263 F. Supp. 421, aff'd per curiam 385 U.S. 457 (1967);

(23) erroneously stated in its report that a major bus line operates four northbound buses daily between Evansville, Ind. and Chicago, Ill., whereas only three buses are so operated;

(24) erroneously found that the first (last) six months of 1967 represented the present level of patronage of the trains, since travel on the trains is heavier in the last six months of the year;

(25) erroneously gave weight to the asserted Eastern passenger deficits in excess of $1 million in each year for

the years 1962 through 1966, when Eastern itself did not claim such losses and where the actual losses for the entire Eastern system, on Eastern's own basis, could not exceed $500,000 for the year 1966;

(26) erroneously found that passenger utilization of trains 93 and 54 was dwindling;

(27) erroneously failed to offset claimed savings by the discontinuance of trains 93 and 54 with the added expenses incurred in transporting mail in TOFC (piggyback) service, in marked contrast to the crediting of such additional mail expense for L&N in Finance Docket No. 24646, 331 I.C.C. at 455-56, involving companion trains Nos. 92 and 53 between St. Louis, Mo. and Nashville, Tenn.;

(28) erroneously found that discontinuance by Eastern of trains 93 and 54 is consistent with the purpose of section 13a(1) of the act, and the objectives of the National Transportation Policy;

(29) in failing to render any subsidiary findings as to the probable effect of the discontinuance of Eastern's segment of trains 93 and 54 upon railroad employees;

(30) in failing to consider and to evaluate passenger utilization statistics presented in evidence by Eastern for the months of June, July, August and September, 1967;

(31) in failing to find that utilization of the trains and passenger revenue for Eastern's segment of the trains increased in the first six months of 1967 over the comparable period in 1966;

(32) in finding that Eastern's segment of the trains is not required by public convenience and necessity, and would unduly burden interstate or foreign commerce;

(33) erroneously failed to take official notice of the findings in Finance Docket 24646 that discontinuance of Eastern's segment of trains 93 and 54 would adversely affect the operation of L&N's segment of these trains (331 I.C.C. at 215), and to consider such impact in determining

whether Eastern's part of the trains should be continued in Finance Docket No. 24725;

(34) erroneously relied upon its findings in F.D. 21755 as to Eastern's financial condition, when such findings were repudiated by this Court as "unquestionably stale", *Illinois Central Railroad Company v. United States*, 263 F. Supp. at 434;

(35) erroneously included general overhead expenses in determining the savings upon discontinuance of Eastern's segment of trains 93 and 54;

(36) erroneously included passenger car and locomotive depreciation expense in determining the savings upon discontinuance when the record does not indicate that any such equipment would be retired upon discontinuance;

(37) erroneously included joint facility expenses for the Chicago & Western Indiana Railroad Company as savable upon discontinuance, in view of there being no such reduction in expenses upon discontinuance, together with the obligation of L&N to assume all passenger expenses and one-half of Eastern's entire obligation to Chicago & Western Indiana Railroad Company (327 I.C.C. at 362, 386);

VIII.

The deficiencies in the findings, decisions and orders of the Commission proceedings specified in Paragraph VI and Paragraph VII, among others, if not enjoined annulled, suspended and set aside, would operate to the substantial damage and irreparable injury of plaintiffs, and these plaintiffs are without an adequate remedy at law.

IX.

WHEREFORE, plaintiffs respectfully pray:

1. That a court constituted as required by 28 U.S.C. Sections 2284 and 2321-2325 inclusive, consisting of three judges, of whom at least one shall be a circuit judge, be convened, unless this action is deemed to be a supplemental

proceeding to No. 65-C-1393, for which a three-judge court has been convened previously.

2. That the court of three judges, upon final hearing of this suit enter a decree permanently suspending, enjoining, setting aside and annulling the said orders of the Interstate Commerce Commission, in whole or in part, as complained of herein.

3. That plaintiffs have such other and further relief in the premises as to the court may seem required by equity and as may be deemed fit and proper.

RAYMOND F. SIMON, *Corporation Counsel*
BERNARD RANE, *Asst. Corp. Counsel*
City of Chicago
511 City Hall Bldg.
Chicago, Ill. 60602

NEILL S. BROWN
ROBERT E. KENDRICK
204 Metropolitan Courthouse Bldg.
Nashville, Tenn. 37201

WENDELL W. WRIGHT
MARION E. WRIGHT
106 N. Vermilion Street
Danville, Ill. 61833

WILLIAM E. NELSON
Dyer Building
Hoopeston, Ill.

KEITH E. ROBERTS
120 S. LaSalle Street
Chicago, Ill. 60603

GEORGE B. TOFAUTE
17 Harding Avenue
Terre Haute, Ind. 47801

ROBERT P. DOOLITTLE, JR.
801 Busseron Street
Vincennes, Ind.

GORDON P. MacDOUGALL
705 Ring Building
Washington, D. C. 20036

Dated at
Chicago, Ill.
May 27, 1968

CERTIFICATE OF SERVICE

I hereby certify that the following parties in No. 65-C-1393 were served a copy of the foregoing by first-class mail' postage prepaid on May 27, 1968:

HARRY R. BEGLEY
Attorney for Louisville & Nashville R.R. Co.
38 S. Dearborn Street
Chicago, Ill.

LEON LEIGHTON
Pro Se
6 East 45th Street
New York, N.Y. 10017

ALBERT E. JENNER, JR.
Attorney for Missouri Pacific R.R. Co.
135 S. LaSalle Street
Chicago, Ill.

WILLIAM J. O'BRIEN, JR.
Attorney for Illinois Central R.R. Co.
135 East 11th Place
Chicago, Ill. 60605

JOHN B. GOODRICH
Attorney for Monon Railroad
332 S. Michigan Avenue
Chicago, Ill. 60604

NUEL D. BELNAP
Attorney for St. Louis-Southwestern Ry. Lines
One North LaSalle Street
Chicago, Ill.

BERNARD RANE, Asst. Corp. Counsel
City of Chicago
511 City Hall Building
Chicago, Ill. 60602

Dated at
Chicago, Ill.
May 27, 1968

APPENDIX 1

Report and Order of Interstate Commerce Commission in Finance Docket No. 24725 entered January 25, 1968 (331 I.C.C. 447)

APPENDIX 2

VANDERBILT UNIVERSITY
News Bureau
Nashville, Tennessee 37203

[F.D. 24725]

March 21, 1968

[Interstate Commerce Commission
Received Mar. 22, 1968
Records & Service Mail Branch]

Secretary
Interstate Commerce Commission
Washington, D.C.

Dear Sirs:

In trying to make reservations for a train trip from Nashville to Chicago, I was informed by L&N that they no longer have daily service into Chicago. This comes as quite a shock because on my recent trips aboard the Georgian

(train #3-7) there were many people on the train. Also, it comes as a surprise because the ICC made the L&N maintain the only direct service between Nashville and St. Louis, and I would assume that passenger train service between Nashville and Chicago would be much more in the public interest, convenience, and necessity than even the St. Louis-Evansville run because so many more persons use the train.

I would have protested the proposed discontinuance of this train had I known it was to be discontinued. I thought that public announcement and public display of the discontinuance application were required in all stations affected by the action. There was no public display of the application in Union Station at Nashville—and since this action halts all daily train service between Nashville and Chicago, I would think that the display of intentions to discontinue would have been mandatory. I realize that the segment involved halts service only between Evansville and Chicago on the C&EI, but this action affects all stations between Chicago and Atlanta and between Chicago and New Orleans.

This matter can still be corrected. A condition of the ICC's approval of the L&N's purchase of the Evansville-Chicago division of the C&EI should be that through passenger service be restored into Chicago. As indicated by the L&N's long, hard fight for the C&EI, the financial rewards of the acquisition will be great. It wouldn't be too much to ask that passenger service be restored as a condition of the purchase.

I would like to know if public hearings were held on this discontinuance; and if not, why not. Also, why was there insufficient notification of potential passengers in Nashville, Atlanta, and New Orleans? Finally, what are the chances of the ICC requiring resumption of this vital service as a condition of the L&N's purchase of the C&EI?

Sincerely,

/s/ Gerald Wood

5337
[File in Docket]

April 1, 1968

Mr. Gerald Wood
News Bureau
Vanderbilt University
Nashville, Tennessee 37203

Dear Mr. Wood:

Reference is made to your letter of March 21, 1968, concerning the discontinuance of the Georgian passenger train between St. Louis and Evansville, Indiana, which was discontinued January 31, 1968. I note your desire that this service be resumed, perhaps as a condition to permitting the L&N to purchase the Evansville line of the Chicago and Eastern Illinois Railroad.

The city of Chicago and several other parties have filed petitions in Finance Docket No. 24725 requesting the Commission to reconsider its findings of January 25, 1968, that continuance of the Georgian passenger trains between Chicago and Evansville was not required by the public convenience and necessity and that their continued operation would unduly burden interstate commerce. The matter is now receiving the consideration of the Commission and I have arranged for you to be sent a copy of its decision.

The application of the Louisville and Nashville Railroad Company to acquire the Evansville line of the Chicago and Eastern Illinois was filed March 19, 1968, in Finance Docket No. 25031. Any requests for the imposition of a condition such as you suggest in your letter should be made through the submission of a formal pleading in that proceeding.

Sincerely yours,

[ADVISE OF ALL PROCEEDINGS]

RICHARD BLOCK, JR.
Asst. Deputy Director
Section of Opinions

GWM:vc
OPO

APPENDIX 3

UNIQUE KNITTING COMPANY
Acworth, Georgia

February 12, 1968

[Received Feb. 15, 1968
8:46 A.M.
Commissioner Murphy]

Louisville & Nashville Railroad Company,
908 W. Broadway,
Louisville, Kentucky 40201

Gentlemen:

As none of us up here fly, and must get to Chicago on business occasionally, we were shocked to read that ICC granted C./E.I. permission to discontinue Pullman service between Evansville, Indiana, and Chicago, which in turn eliminates Pullman service on the L&N between Atlanta and Chicago.

It may be poor railroading, but we wonder if concentrated traffic, two days a week, for Pullman service would help financially?

Another important factor is that the Atlanta Airport is a 90 mile round trip (45 miles one way) from here, which means another 90 mile trip upon return arrival; total 180 miles as a side line to main trip to Chicago. Planes seem to leave and arrive during Freeway rush periods, and two and a half hours down, and also return can consume eight to ten hours, which is a whole day wasted. This is against meeting The Georgian in Marietta, (ten miles distant) in about twenty or twenty-five minutes—or at most one hour round trip.

It is difficult to understand the ICC granting something to C./E.I. without considering the L&N and their customers.

We hope that you and C./E.I. can arrange at least partial Pullman service to alleviate some of our business travel worries. Thanks.

Yours very truly,

UNIQUE KNITTING COMPANY,

F. J. Kienel
gl

c.c. ICC–Washington, D.C.
c.c. Congressman John W. Davis
c.c. Cobb County Chamber of Commerce
c.c. Georgia State Chamber of Commerce
c.c. Louisville & Nashville RR–Atlanta

[File in Docket]

February 16, 1968

Mr. F. J. Kienel
Unique Knitting Company
Acworth, Georgia 30101

Dear Mr. Kienel:

This will acknowledge receipt of the copy of the letter you addressed to the Louisville & Nashville Railroad Company concerning the discontinuance of Pullman service by the Chicago & Eastern Illinois Railroad between Evansville, Indiana, and Chicago, Illinois. I note your statement that this in turn eliminates Pullman service on the L&N between Atlanta and Chicago, and your inquiry concerning the advisability of operating Pullman service two days a week.

The Commission instituted an investigation of the notice filed by the C&EI in Finance Docket No. 24725, held public hearings, and issued a report and order dated January 25, 1968, in which it found that passenger trains Nos. 93 and 54 between Chicago and Evansville were not

required by the public convenience and necessity and that their continued operation will unduly burden interstate commerce. A number of persons in opposition to the discontinuance testified at the hearings and the Commission considered the evidence of record in the light of the statutory criteria governing train discontinuance cases. I am enclosing a copy of the Commission's report which refers to some of the evidence submitted in the case and sets forth the Commission's reasons in support of its ultimate conclusion. You will note that the Commission found that continued operation of the trains would result in an out-of-pocket loss to the C&EI of over $400,000 per year with the prospects that the deficit would go beyond a half million dollars.

This Commission has no jurisdiction over your suggestion for providing Pullman service two days a week in the absence of a filing by the railroad concerned of a notice under section 13a(1) of the Interstate Commerce Act. That section provides that a railroad may, but is not required to, file a notice with this Commission advising of its intention to change or discontinue passenger train service. In the absence of such a filing the proposed change or discontinuance of service is a matter within the administrative discretion of the railroad unless the States in which the trains operate have enacted laws regulating such matters.

The Commission considers the needs of all persons and communities served by the trains proposed for discontinuance. It recognizes that the discontinuance of any passenger train will probably result in inconvenience to some persons. However, the Commission must be guided in its final determination by the provisions set forth in the law governing such proceedings.

Sincerely yours,

/s/ Rupert L. Murphy
Commissioner

Enclosure

APPENDIX 4

Order of Interstate Commerce Commission on reconsideration in Finance Docket No. 24725 entered May 8, 1968.

* * *

APPENDIX 5

Corrected order of Interstate Commerce Commission on reconsideration in Finance Docket No. 24725 entered May 8 and served May 15, 1968.

* * *

APPENDIX 6

Report and Order of Interstate Commerce Commission in Finance Docket No. 24646, entered November 22, 1967 (331 I.C.C. 203).

* * *

APPENDIX 7

Order of Interstate Commerce Commission in Finance Docket No. 24646 entered March 12, 1968.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITY OF CHICAGO, et al.,

Plaintiffs,

v. No. 68 C 956

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,

Defendants.

MOTION OF DEFENDANT
CHICAGO AND EASTERN ILLINOIS
RAILROAD COMPANY

I.

Motion To Dismiss Complaint

Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, defendant Chicago and Eastern Illinois Railroad Company ("Eastern") moves for entry of an order dismissing the complaint, on the following grounds:

1. This Court is without jurisdiction of the subject matter of plaintiffs' complaint.

(a) Plaintiff seeks review of an order of the Interstate Commerce Commission ("Commission") discontinuing an investigation pursuant to Section 13a(1) of the Interstate Commerce Act into the proposed discontinuance of Eastern's trains Nos. 93 and 54 between Chicago, Illinois and Evansville, Indiana. Said investigation was discontinued on January 25, 1968, and notice was served January 31, 1968.

(b) The Commission's discontinuance of an investigation of the proposed discontinuance of an interstate train is not subject to review by a United States District Court.

2. Plaintiffs are without standing to seek review of the Commission's action in this case.

(a) Plaintiff Metropolitan Government of Nashville and Davidson County, Tennessee purports to represent the citizens of an area which is not located along the route of discontinued trains 93 and 54. Neither said plaintiff nor its citizens have any interest in the discontinuation of said trains, nor have they suffered any injury thereby. It is without standing to bring this action on its own behalf or in a representative capacity.

(b) Plaintiffs City of Chicago, Village of Milford, City of Watseka, City of Hoopeston, City of Terre Haute and City of Vincennes, are municipal corporations whose areas were served by trains 93 and 54. These plaintiffs purport to sue on behalf of the citizens of their communities. None of said municipal corporations has any direct interest in or has suffered any direct, proximate or cognizable injury from the discontinuation of trains 93 and 54. They are without standing to bring this action in a representative capacity or otherwise.

(c) Plaintiff Maurice F. Radrizzi, an official of the Brotherhood of Railroad Trainmen, has not been personally affected by discontinuance of trains 93 and 54, nor does he allege any direct, proximate or cognizable injury from the discontinuation of trains 93 and 54. He is without standing to bring this action in a representative capacity or otherwise.

3. The complaint fails to state a claim upon which relief can be granted.

II.

Alternative Motion To Strike Portions of the Complaint

In the alternative, solely in the event the Court denies the foregoing motion to dismiss, Eastern moves for entry of an order striking the following paragraphs of the complaint on the grounds set forth below:

1. *Paragraphs VI(A) and VII(A)(1).*

(a) In these paragraphs, plaintiffs seek to challenge collaterally a portion of the order entered by the Commission on February 16, 1965 in Finance Docket No. 21755, *Missouri Pacific Railroad Co.–Control–Chicago & Eastern Illinois Railroad Co.*, 327 I.C.C. 279. That order was affirmed by a three-judge court in this District (Judges Schnackenberg and Decker, Chief Judge Campbell dissenting), and by the United States Supreme Court. *Illinois Central Railroad Co. v. United States*, 385 U.S. 457 (1967), *affirming per curiam* 263 F. Supp. 421 (N.D. Ill. 1966).

(b) Plaintiffs are barred by principles of *res judicata* and collateral estoppel from challenging the Commission's order in Finance Docket No. 21755.

(c) In this action to review the Commission's order in Finance Docket No. 24725, plaintiffs may not seek review of an order entered by the Commission in Finance Docket No. 21755.

(d) Plaintiffs may not at this time obtain review of the order entered by the Commission in 1965 in Finance Docket No. 21755, since more than three years have elapsed since the Commission entered the order.

(e) The Commission, in Finance Docket No. 24725, has conducted a new investigation as to whether or not trains 93 and 54 should be discontinued. The

Commission's discontinuance of that investigation supersedes, as to trains 93 and 54, matters considered in Finance Docket No. 21755 which were in any way relevant to the subject to discontinuance of trains by Eastern.

(f) Neither in the case here under review (Finance Docket No. 24725), nor in Finance Docket No. 21755, did plaintiffs raise before the Commission the objections they now seek to raise in paragraphs VI(A) and VII(A)(1) of the complaint. Plaintiffs are limited to raising before this Court the objections which they raised before the Commission. All other objections are waived.

(g) Neither in the case here under review (Finance Docket No. 24725), nor in Finance Docket No. 21755, did plaintiffs file a petition before the Commission seeking reconsideration with respect to the matters raised in paragraphs VI(A) and VII(A)(1) of the complaint. The filing of such a petition for reconsideration is a necessary prerequisite to plaintiffs' right to raise those matters in their complaint.

(h) Plaintiffs failed to exhaust their administrative and judicial remedies in Finance Docket No. 21755.

2. *Paragraph VII(A)(2).* In this paragraph, plaintiffs seek to challenge (a) the Commission's failure to require compliance with an order it entered on February 7, 1967 in Finance Docket No. 21755, and (b) the Commission's denial of plaintiffs' motion to require that Missouri Pacific Railroad Company be made a party in Finance Docket No. 24725.

(a) Plaintiffs may not in this case challenge the Commission's action with respect to its order of February 7, 1967 in Finance Docket No. 21755 for the reasons stated in Part II, paragraph 1, above.

(b) Missouri Pacific Railroad Company has no involvement in the discontinuance of trains 93 and 54.

(c) The Commission's order of February 7, 1967 in Finance Docket No. 21755 contains no conditions or requirements, but merely reinstates an order entered earlier by the Commission.

3. *Paragraphs VII(B)(2), VII(B)(3), VII(B)(4), VII(B)(5) and VII(B)(6).* Section 13a(1) of the Interstate Commerce Act and the applicable rules of the Commission were fully satisfied by the notice given by Eastern.

4. *Paragraphs VII(B)(7), VII(B)(8), VII(B)(9) and VII(B)(10).* Each of trains Nos. 93 and 54 is an entire train within the meaning of Section 13a(1), and each must be considered independently of any train with which it connects.

5. *Paragraphs VII(B)(12) and VII(B)(15).*

(a) The Commission did not enter an order of continuance pursuant to Section 13a(1) prior to February 1, 1968. Accordingly, Eastern was authorized to discontinue trains Nos. 93 and 54 on that date due to the expiration of the statutory four month extension ordered by the Commission on September 18, 1967.

(b) Section 15(2) of the Interstate Commerce Act is not applicable to proceedings under Section 13a(1) of the Act.

(c) In any event, the Commission's order provides that it shall not be effective for 35 days. (331 I.C.C. at 464.)

6. *Paragraphs VII(B)(13), (14), (17), (28), (29), (32) and (37).* The allegations of said paragraphs are so vague, indefinite and uncertain that Eastern is unable to prepare a responsive pleading thereto.

7. *Appendix 2 and Appendix 3.* The documents contained therein are wholly irrelevant to any matters raised in the complaint.

III.

Motion To Dismiss Eastern as a Defendant

In the alternative, solely in the event the Court denies the foregoing motion to dismiss, Eastern moves that it be dismissed as a party defendant and granted leave to intervene as a party defendant.

The only proper defendant is the United States of America. Eastern should be dismissed as a party defendant, and granted leave to intervene as a party defendant.

Respectfully submitted,

/s/ Albert E. Jenner, Jr.

/s/ Thomas P. Sullivan

/s/ Keith F. Bode

/s/ David C. Roston

Attorneys for defendant Chicago and Eastern Illinois Railroad Company

Of Counsel:

Raymond, Mayer, Jenner & Block
135 S. La Salle Street
Chicago, Illinois 60603

Patrick C. Mullen
James H. Durkin
646 Chicago Road
Chicago Heights, Illinois 60411

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITY OF CHICAGO, et al.,

Plaintiffs,

v.

Civil Action
No. 68 C 956

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

and,

CHICAGO & EASTERN ILLINOIS
RAILROAD CO.,

Defendants.

JOINT ANSWER OF THE UNITED STATES OF AMERICA
AND THE INTERSTATE COMMERCE COMMISSION

The United States of America and the Interstate Commerce Commission, defendants herein, answer the complaint as follows:

I.

Admit the allegations of paragraph I of the complaint.

II.

Answering the allegations of paragraph II A. of the complaint, admit that the parties listed in paragraphs I (1) and (3) of the complaint were parties to the proceedings before the Commission and that the Commission's report and order were issued and served on the dates alleged. Defendants respectfully refer this Court to the cited report and order for a complete and accurate statement of the findings, conclusions and order of the Commission.

Answering the allegations of paragraph II B. of the complaint, admit that the parties listed in paragraph I (2) of the complaint were not parties to the proceedings before the Commission, that hearings were not held at points located south of Evansville, that no notice of discontinuance was

posted at stations in the vicinity of Nashville, that the Governor of Tennessee was not served with notice, and that Appendices 2 and 3 are attached to the complaint. With respect to the remaining allegation of paragraph II B. of the complaint, insofar as they attempt to characterize findings of the Commission, defendants respectfully refer this Court to the assailed report and order for an accurate statement of those findings, and insofar as they are argumentative defendants aver that they require no answer. Defendants further answer that the provisions of section 13a(1) of the Interstate Commerce Act were fully complied with.

III.

Admit the allegations of paragraphs III through V, inclusive, of the complaint.

IV.

Answering the allegations of paragraph VI A. of the complaint, defendants aver that the cited Commission order has been subjected to judicial review and sustained by the courts in *Illinois Central R. Co. v. United States*, 263 F. Supp. 421 (N.D. Ill. 1966), aff'd 385 U.S. 457 (1967), and that plaintiffs' attack on that order is barred by principles of *res judicata* and collateral estoppel, and that the order is over 3½ years old and that plaintiffs' attack is further barred by laches.

Admit the allegations of paragraph VI B. of the complaint.

V.

Answering the allegations of paragraphs VII and VIII of the complaint, including each and every subparagraph thereof, defendants deny that the actions of the Commission are unlawful for any of the reasons stated or for any other reason whatsoever and aver that the assailed Commission order is valid in all respects.

WHEREFORE, defendants, the United States of America and the Interstate Commerce Commission pray that the complaint be dismissed and the relief sought be denied.

EDWIN M. ZIMMERMAN
Assistant Attorney General

JOHN H. D. WIGGER
Attorney
Department of Justice
Washington, D.C. 20530

THOMAS A. FORAN
United States Attorney
Chicago, Illinois

Attorneys for the United States of America

ROBERT W. GINNANE
General Counsel

BARRY ROBERTS
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

Attorneys for the Interstate Commerce Commission

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TENNESSEE PUBLIC SERVICE COMMISSION, CITY OF CHICAGO, THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, STATE OF LOUISIANA, ALABAMA PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSION OF OHIO, RAILWAY LABOR EXECUTIVES' ASSOCIATION and UNITED TRANSPORT SERVICE EMPLOYEES (AFL-CIO),

Plaintiffs,

v. No. 68 C 1666

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

Defendants.

AMENDED COMPLAINT

Plaintiffs are communities, a State, State agencies entrusted with the maintenance of adequate railroad facilities, and labor organizations which attack various findings, decision and order of the Interstate Commerce Commission ("Commission"), entered under section 13a(1) of the Interstate Commerce Act, 49 U.S.C. section 13a(1), as follows:

A. *"Hummingbird" Trains.* Plaintiff State of Louisiana is served by the "Hummingbird" passenger trains operated by defendant Louisville & Nashville Railroad Company ("L&N"). Although not directly served by the "Georgian" passenger trains, plaintiff has available "Georgian-Hummingbird" train service. Plaintiff Public Utilities Commission of Ohio is served by the "Hummingbird" passenger trains.

B. *"Georgian" Trains.* Plaintiff City of Chicago was formerly served by the "Georgian" passenger trains jointly operated by Chicago & Eastern Illinois Railroad Company ("C&EI") and L&N. Although not directly served by the

"Hummingbird" trains, City of Chicago formerly had available "Georgian-Hummingbird" train service.

C. *"Hummingbird" & "Georgian" Trains.* Plaintiffs Tennessee Public Service Commission, Alabama Public Service Commission and The Metropolitan Government of Nashville and Davidson County Tennessee are served by the "Hummingbird" trains and by the "Georgian" trains, the latter presently operating only between Evansville, Ind. and Atlanta, Ga. subsequent to the discontinuance by C&EI of its segment of the "Georgian" between Chicago, Ill. and Evansville, Ind.

D. *Labor Organization.* Plaintiff Railway Labor Executives' Association is composed of the chief executives of railway labor unions which represent most of the employees on defendant Louisville and Nashville Railroad Company. Plaintiff United Transport Service Employees (AFL-CIO) represents the coach attendants on the "Hummingbird".

II.

All of the plaintiffs except United Transport Service Employees (AFL-CIO) were parties to proceedings before the Interstate Commerce Commission known as Finance Docket No. 25047, *Louisville and Nashville Railroad Company Discontinuance of Trans Nos. 6 and 7 Between New Orleans, La., and Cincinnati, Ohio.* The decision of the Commission, Division 3, dated September 3 and served September 6, 1968 is attached hereto as Appendix 1.

The plaintiffs listed in I.B. and I.C. (except plaintiff Public Utilities Commission of Ohio) are also plaintiffs or intervening plaintiffs in No. 68 C 956, *City of Chicago v. United States,* an action seeking to set aside orders of the Commission authorizing the discontinuance by C&EI of its segment of the "Georgian" trains in Finance Docket No. 24725, *Chicago & E.I.R. Co. Discontinuance–Chicago & Evansville,* 331 I.C.C. 447 (1/25/68), aff'd on reconsid. May 8, 1968.

III.

This action is brought under, and the United States is made a defendant under, and the jurisdiction of this court is conferred by, Title 28 of the United States Code, Sections 1336(a), 1398(a), 1651, 2321-25, inclusive, and 2284; Interstate Commerce Act (49 U.S.C. section 1 et seq., and particularly sections 13a(1) and 17(9); the Fifth Amendment to the Constitution of the United States; and the Administrative Procedure Act, 5 U.S.C. sections 702-5, inclusive.

IV.

The venue of this action is in this Court, pursuant to the provisions of 28 U.S.C. 1398(a), referred to above, because plaintiff City of Chicago is located within the jurisdiction of this Court.

V.

Defendant United States of America is a statutory defendant which is named as a party pursuant to 28 U.S.C. 2322. Defendant Interstate Commerce Commission is an administrative agency, created by the Act to Regulate Commerce, Approved February 4, 1887, 24 Stat. 283, and amendments thereto, now known as the Interstate Commerce Act, with specifically vested powers and duties respecting transportation in interstate and foreign commerce.

Defendant Louisville & Nashville Railroad Company is a railroad corporation with its principal office at Louisville, Ky. and which is doing business in the Northern District of Illinois with offices at 105 W. Adams Street in the City of Chicago.

VI.

This action seeks to enjoin, annul, suspend and set aside the findings, decision and order of the Interstate Commerce Commission, Division 3, dated September 3 and served September 6, 1968 in Finance Docket No. 25047, *Louisville and Nashville Railroad Company Discontinuance of Trains*

Nos. 6 and 7 Between New Orleans, La., and Cincinnati, Ohio, and in aid of such judicial review, and as a part thereof as well as independently, to require that L&N not discontinue its passenger trains Nos. 6 and 7.

VII.

The findings, decision and order of the Commission, set forth in Paragraph VI, above, are erroneous, unsupported by substantial evidence, without rational basis, lack the necessary findings, and are violative of due process, on the following grounds, among others:

(a) Erroneously failed to adopt the request of plaintiffs City of Chicago and The Metropolitan Government of Nashville and Davidson County Tennessee, that the Commission seek to restrain the discontinuance of the "Hummingbird" trains pending judicial review of C&EI's discontinuance of its segment of the "Georgian" trains. (F.D. 25047, *Report,* pp. 12-13).

(b) Erroneously assumed that this Court will not decide No. 68 C 956 for "perhaps longer than a year." (F.D. 25047, *Report,* p. 13).

(c) Erroneously failed to render a positive determination, or to hold further hearings to enable it to determine, whether a ruling favorable to plaintiffs in No. 68 C 956 would result in an order requiring continuance of the "Hummingbird" trains, rather than rendition of the inconclusive finding that a favorable ruling in No. 68 C 956 "might or might not change the picture." (F.D. 25047, *Report,* p. 13).

(d) Erroneously adopted the carrier's estimate that it incurred a loss of $505,361 for the year 1967 in operating the "Hummingbird" trains without considering and evaluating the carrier's explanation on brief that the abnormal data for 1967 was caused by inflation and because the expense of handling added equipment on train No. 7 formerly handled on train No. 37, was greater than the added revenue to No. 7 from Train No. 37. (F.D. 25047, *Report,* p. 7; L&N *Brief,* pp. 4-5).

(e) Erroneously gave consideration to the expense of handling equipment from former train No. 37 since such expense and alteration of schedules was fully evaluated and credited in a prior proceeding. *Atlanta & W.P.R. Co. Discontinuance of Trains,* 330 I.C.C. 133, 135-36 (1966).

(f) Erroneously failed to evaluate and make the requisite findings based upon the 10 percent passenger fare increase granted in 1968 which will materially increase L&N revenues for the "Hummingbird" trains, and greatly reduce the asserted loss for 1967.

(g) Erroneously found that "Georgian-Hummingbird" train service consists of C&EI trains Nos. 93 and 54 at Evansville, Ind., L&N trains Nos. 5 and 10 between Evansville, Ind. and Nashville, Tenn., and connecting L&N trains Nos. 6 and 7, whereas the connecting service between Evansville, Ind. and Nashville, Tenn. was found to be trains Nos. 93 and 54 (331 I.C.C. 447, 450 and 331 I.C.C. 203,204, Appendix 1 and Appendix 6 to Complaint in No. 68 C 956) and L&N trains 5 and 10 operate between St. Louis, Mo. and Evansville, Ind.

(h) Erroneously found that former sources of traffic and revenue are unalterably foreclosed in view of the pending litigation before this court which the report itself acknowledges. (F.D. 25047, *Report,* p. 15 and p. 12)

(i) Erroneously relied upon "on" and "off" data which were incorrectly computed for various cities. (F.D. 25047, *Report,* p. 5)

(j) Erroneously failed to render subsidiary finding as to the impact of the discontinuance upon railway labor.

(k) Erroneously erred as a matter of law in finding that the Commission is without authority to impose employee protective conditions under 49 U.S.C. 13a(1). (F.D. 25047, *Report,* p. 16)

(l) Erroneously considered a proposed schedule change by the Atlanta and West Point Railroad between Atlanta, Ga. and Montgomery, Ala. which was not made the subject

of a section 13a(1) notice invoking federal jurisdiction. (F.D. 25037, *Report*, pp. 6-7)

(m) Erroneously failed to consider and render the requisite finding that L&N's overall passenger deficit for its system is very small, whereas its system profit is one of the highest in the Nation. (F.D. 25047, *Report*, p. 6)

(n) Erroneously found that continued operation of the "Hummingbird" trains is not required by public convenience and necessity and that continued operation would unduly burden interstate commerce.

VIII.

The deficiencies in the findings, decision and order of the Commission, Division 3, specified in Paragraphs VI and VII, among others, if not enjoined, annulled, suspended and set aside, would operate to the substantial damage and irreparable injury of plaintiffs, and these plaintiffs are without an adequate remedy at law.

IX.

WHEREFORE, plaintiffs respectfully pray:

1. That in accordance with 28 U.S.C. 2284(3) and 1651 and 5 U.S.C. 705, the decision and action of the Interstate Commerce Commission complained of in this suit be temporarily restrained and stayed from taking effect until hearing and determination by a three-judge court.

2. That a court constituted as required by 28 U.S.C. 2284 and 2321-2325, consisting of three judges, of whom at least one shall be a circuit judge, be convened, and that said Court so constituted and convened shall hear and determine this suit.

3. That the court of three judges issue an interlocutory injunction staying and suspending the operation of said decision and action authorized by the Interstate Commerce Commission pending final hearing and determination of this suit.

4. That the court of three judges, upon final hearing of this suit enter a decree permanently suspending, enjoining, setting aside and annulling the said orders of the Interstate Commerce Commission, in whole or in part, as complained of herein.

5. That plaintiffs have such other and further relief in the premises as to the court may seem required by equity and as may be deemed fit and proper.

RAYMOND F. SIMON, *Corporation Counsel*
BERNARD RANE, *Asst. Corp. Counsel*
511 City Hall Building
Chicago, Ill. 60602

EUGENE W. WARD
J. KENNETH ATKINS
Cordell Hull Building
Nashville, Tenn. 37219

NEILL S. BROWN
ROBERT E. KENDRICK
204 Metropolitan Courthouse Bldg.
Nashville, Tenn. 37201

WELDON A. COUSINS
737 National Bank of Commerce Bldg.
New Orleans, La.

WILLIAM G. MAHONEY
620 Tower Building
Washington, D. C. 20005

LANGDON D. BELL
111 N. High Street
Columbus, Ohio 43215

WILLIAM F. BLACK
State Office Building
Montgomery, Ala. 36102

GORDON P. MacDOUGALL
705 Ring Building
Washington, D.C. 20036
Attorneys for Plaintiffs

Dated at
Chicago, Ill.
September 12, 1968

CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of September 1968 served a copy of the foregoing amended complaint upon counsel for all parties of record in this action as well as in No. 68 C 956, *City of Chicago v. United States*, by first-class mail postage prepaid.

Chicago, Ill. BERNARD RANE

VERIFICATION

STATE OF ILLINOIS
COUNTY OF COOK ss:

BERNARD RANE being duly sworn deposes and says that he is Assistant Corporation Counsel for the City of Chicago; that the plaintiffs herein are united in interest and pleading together; and that he has read the foregoing complaint and the same is true to his own knowledge except as to the matters alleged upon information and belief and as to those matters he believes them to be true.

Sworn to before me this
12th day of September, 1968

/s/ Beranrd Rane

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TENNESSEE PUBLIC SERVICE COMMISSION, et al.,

Plaintiffs,

v.

No. 68 C 1666

UNITED STATES OF AMERICA, et al.,

Defendants.

MOTION OF LOUISVILLE AND NASHVILLE RAILROAD COMPANY, DEFENDANT, TO DISMISS THE COMPLAINT

Now comes the Louisville and Nashville Railroad Company, defendant, (L&N), and respectfully moves the Court to dismiss the complaint herein for the following reasons:

1. The City of Chicago has no standing to bring the complaint and so venue does not lie in this Court.

2. The report and order of the Interstate Commerce Commission involved in this case is not subject to judicial review.

Respectfully submitted,

PHILIP M. LANIER
JOSEPH L. LENIHAN
JAMES W. HOELAND
C. T. COOMES
908 West Broadway
Louisville, Kentucky 40201

HARRY R. BEGLEY
38 South Dearborn Street
Chicago, Illinois 60603

Attorneys for Louisville and Nashville Railroad Company

908 West Broadway
Louisville, Kentucky 40201

September 11, 1968.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL.,
Plaintiffs,
v.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Defendants.

Civil Action
No. 68 C 1666

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

The United States of America and the Interstate Commerce Commission, defendants herein, answer the amended complaint as follows:

I.

Admit the allegations of paragraphs I through VI, inclusive, of the amended complaint.

II.

Answering the allegations of paragraphs VII and VIII of the amended complaint, defendants deny that the actions of the Commission are unlawful for any of the reasons stated or for any other reason whatsoever and aver that the assailed Commission order is valid in all respects.

WHEREFORE, defendants, the United States of America and the Interstate Commerce Commission pray that the

amended complaint be dismissed and the relief sought be denied.

EDWIN M. ZIMMERMAN
Assistant Attorney General

JOHN H. D. WIGGER
Attorney
Department of Justice
Washington, D.C. 20530

THOMAS A. FORAN
United States Attorney
Chicago, Illinois

Attorneys for the United States of America

ROBERT W. GINNANE
General Counsel

BARRY ROBERTS
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

Attorneys for the Interstate Commerce Commission

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL.,
Plaintiffs,

v.

No. 68 C 1666

UNITED STATES OF AMERICA, ET AL.,
Defendants.

AMENDED ANSWER OF LOUISVILLE AND NASHVILLE RAILROAD COMPANY, DEFENDANT

Louisville and Nashville Railroad Company, defendant, (L&N), answers the complaint in this proceeding as follows:

I.

Defendant admits that plaintiffs are communities, a state, state agencies and labor organizations. Defendant denies that any plaintiff is entrusted with the maintenance of adequate railroad facilities, such authority, insofar as is pertinent to this proceeding, being within the exclusive jurisdiction of the Interstate Commerce Commission.

A. Defendant denies that the Hummingbird (hereinafter referred to as L&N trains Nos. 6 and 7) serves the State of Louisiana, since they only serve the City of New Orleans. Defendant also denies that plaintiff State of Louisiana has available "Georgian-Hummingbird" train service, as the Chicago & Eastern Illinois Railroad Company has discontinued its trains Nos. 54 and 93 (the Georgian) between Chicago and Evansville.

B. Defendant admits that prior to the discontinuance by the Chicago & Eastern Illinois Railroad Company of its trains Nos. 54 and 93, referred to in the complaint as the "Georgian," passenger service was available between Chicago, on the one hand, and other points via said C&EI trains Nos. 54 and 93, thence via L&N trains Nos. 3 and 4 and thence via L&N trains Nos. 6 and 7.

C. Defendant denies that L&N trains Nos. 6 and 7 serve any plaintiffs.

D. Defendant admits the allegations of subparagraph D.

II.

Defendant admits the allegations of Paragraph II.

III.

Defendant denies that this Court has jurisdiction of the action.

IV.

Defendant denies that venue lies in this Court, because no party, having standing to bring it, resides or has its principal place of business in the judicial district.

V.

Defendant admits the allegation of Paragraph V.

VI.

Defendant denies that the Court has jurisdiction in the premises.

VII.

Defendant denies the allegations in Paragraph VII.

VIII.

Defendant denies the allegations in Paragraph VIII.

IX.

Defendant denies the allegations in Paragraph IX.

FURTHER ANSWERING, Defendant denies that the report and order of the Interstate Commerce Commission are unlawful or otherwise improper for any of the reasons alleged in the complaint.

WHEREFORE, Louisville and Nashville Railroad Company prays that the relief sought, both interlocutory and permanent, be denied and that the complaint be dismissed.

Respectfully submitted,

HARRY R. BEGLEY
38 South Dearborn Street
Chicago, Illinois 60603

PHILIP M. LANIER
JOSEPH L. LENIHAN
JAMES W. HOELAND
C. T. COOMES
908 West Broadway
Louisville, Kentucky 40201

Attorneys for Louisville and Nashville Railroad Company.

October 19, 1968.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOCKETED

Name of Presiding Judge, Honorable EDWIN A. ROBSON

Cause No. 68 C 1666 Date SEPT. 6, 1968

Title of Cause TENNESSEE PUBLIC SERVICE COMMISSION, ET AL
V.S.A. et al

Brief Statement of Motion (1) Motion for Temporary Restraining Order
(2) Motion to Consolidate With No. 68 C 956

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel BERNARD RAZE, 511 CITY HALL BLDG., CHICAGO
MARK GOLDSTEIN, 511 " " " "

Representing PLAINTIFFS

Names and Addresses of other counsel entitled to notice and names of parties they represent. See attached list

Enter temporary restraining

Reserve space below for notations by minute clerk

Order motion for temporary injunction and motion for consolidation with 68 C 956, City of Chicago, et al v. U.S.A., et al entered and set for hearing before Judge Perry on Sept. 12, 1968 at 10:15 A.M.

Robson

[illegible] to the Clerk.
[illegible] to address the Court until motion has been ruled.

10 15 AM

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOCKETED
SEP 17 1968

Name of Presiding Judge, Honorable Sam J. Perry

Case No. 68 C 1666 Date

Title of Cause Tennessee Public Service Commission et al
vs
UNITED STATES OF AMERICA

Brief Statement of Motion Hearing on motion for temporary injunction and motion for consolidation

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and addresses of appearing counsel with 68 C 956

Representing

Names and addresses of other counsel entitled to notice and names of parties they represent.

Evd heard & arguments concluded. Ord. alt. Mo of Eight L & N. R.R. Co. to dissolve restr. order or to require pltfs post bond, denied.

Mo of pltfs for extension of temp. restr. order entered 9-6-68, granted & said order to remain in effect until further order of Court. Mo L & N R.R. Co. to dismiss complt. & mo of pltfs for consolidation of this prelim. hrg. with cause 68 C 956 and Eastern unconstitutionality Order pltfs given 6 days to file answ. to deft's mo of this day filed & deft's given 6 days to file reply thereto. Ca. cont. under advisement under rule 13

Reserve space below for notations by minute clerk

Send this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called. (Pltf).

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Judge Sam Perry

Cause No. 69 C. 1666 Date 11/9/65

Title of Cause Tennessee Public Service Commission v. U S A et al

Brief Statement of Motion Motion for Stay of Court Order of 11/8/69 dissolving Temporary Restraining Order in entitled cause and Order th

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel R. T. Lewis - Corp Counsel - City Hall Rm 511 - City Hall

Representing City of Chicago

Names and Addresses of other counsel entitled to notice and names of parties they represent. H. R. Begley - 39 S. Clark - U.S. Atty & Asst Harding - Fed. Bldg

Court entertained this motion & has been informed that Judge Robson is in Washington D.C. on a multiple litigation hearing & the Court has also been informed that Judge Kaufman is also not available therefore, as one of the 3 Judges has the motion is denied for want of jurisdiction of one of the three judges to stay the execution of a three judge Court order

Reserve space below for notations by minute clerk

J. S. Perry

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

Supreme Court of the United States

1364
Nos. 1363 and 4, October Term, 19 68

City of Chicago, et al.,

Appellants,

v.

United States, et al.

APPEALS from the United States District Court for the Northern District of Illinois.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument.

June 16, 1969